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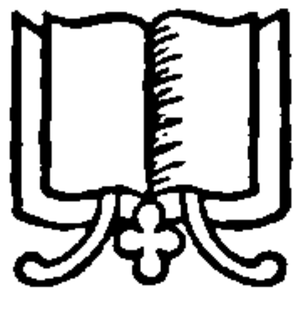
EQUITY
AND ITS REMEDIES

By

CHARLES NEAL BARNEY, A. M., LL. B.

OF THE MASSACHUSETTS BAR



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PREFACE

This book is the outcome of lectures delivered by the author at the Evening Law School of the Boston Y. M. C. A. and at the Law School of Boston University, on the equitable remedies. The justification for putting the material in this form is found in the expressions of gratitude from former students who have been good enough to say that they have found in these lectures citations and statements of principles inaccessible in any text-book. The frequency with which the author has turned to these notes for citations in his own practise has convinced him that others of the profession may be able to find assistance from the same source.

The book is an attempt to give a rational outline of equity (exclusive of trusts and kindred subjects) and to show the scope of the equitable remedies. It does not attempt to deal with strictly statutory subjects or with equity pleading or practice. While the citations are largely drawn from Massachusetts cases (and Ames's Cases on Equity), it is believed the subject is treated in such a way as to make the book of general application, useful to the student or practitioner in any part of the United States. No attempt has been made to cite all the equity cases decided in Massachusetts, although certain parts of the subject, not covered by existing text-books, have been treated with thoroughness. Special attention has been given to late cases.

In preparation of this work the author is indebted to Henry T. Lummus, Esquire, of Lynn, for the use of his notes on certain subjects, and to Asa S. Allen, Esquire, of Boston for valuable assistance in the preparation of material.

C. NEAL BARNEY.

Lynn, Mass., November 15, 1915.

CONTENTS.

CASES CITED IX

CHAPTER I.

PAGES 1 TO 11

ORIGIN AND NATURE OF EQUITY

A. HISTORICAL.
B. EFFECT OF EQUITY GROWTH ON COMMON LAW.
C. AN OUTLINE OF EQUITY.

CHAPTER II.

PAGES 12 TO 23

EQUITABLE PARTIES.

A. SUITS BETWEEN HUSBAND AND WIFE.
B. SUITS BETWEEN PARTNERS.
C. CERTAIN SUITS BETWEEN PARTIES HAVING OR CLAIMING INTERESTS IN A COMMON SUBJECT MATTER.

CHAPTER III.

PAGES 24 TO 38

SOME FEATURES OF EQUITY JURISDICTION AND PROCEDURE.

A. PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW.
   a. Its absence a basis of relief in equity.
   b. Its presence as a defense to equitable procedure.
   c. Its presence in some cases immaterial.
   d. As affecting procedure.
B. THE JURY IN EQUITY.
C. EQUITY ACTS in personam, NOT in rem.

CHAPTER IV.

PAGES 39 TO 51

THE MAXIMS.

A. EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY.

B. EQUITY FOLLOWS THE LAW.

C. WHERE THE EQUITIES ARE EQUAL, THE LAW WILL PREVAIL.

D. WHERE INTERESTS ARE PURELY EQUITABLE AND IN OTHER RESPECTS EQUAL, PRIORITY IN TIME GIVES THE BETTER EQUITY.

E. EQUITY TREATS THAT AS DONE WHICH OUGHT TO BE DONE.

F. HE WHO SEEKS EQUITY MUST DO EQUITY.

G. HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.

H. EQUITY AIDS THE VIGILANT.

CHAPTER V.

PAGES 52 TO 84

SOME DOCTRINES IN EQUITY.

A. ASSIGNMENTS.

B. NOTICE.

C. ESTOPPEL.

1. *Estoppel by Record.*
2. *Estoppel by Deed.*
3. *Estoppel in Pais.*
   a. *From Contract.*
   b. *Equitable Estoppel.*

D. EQUITABLE CONVERSION.

CHAPTER VI.

PAGES 85 TO 114

SOME SPECIFIC GROUNDS FOR RELIEF

A. ACCIDENT.

B. MISTAKE.

1. Excusable Ignorance of a Material Matter
   a. Mistakes of Law.
   b. Mistakes of Fact.
2. Mistakes in Written Instruments.
3. Relief Generally.

C. FRAUD.

1. Jurisdiction.
2. Constructive Fraud.
   a. Apparent from the Bargain Itself.
   b. Presumed from the Circumstances of the Parties.
   c. Transactions Injurious to Third Persons — Fraudulent Conveyances.
   d. Transactions Void as Against Public Policy.
3. Remedies in Fraud.
   a. Remedies at Law.
   b. Remedies in Equity.

CHAPTER VII.

PAGES 115 TO 157

SPECIFIC PERFORMANCE OF CONTRACTS.

A. AFFIRMATIVE CONTRACTS GENERALLY.

a. Contracts about Land.
b. Contracts about Chattels.

c. Stocks and Bonds.
d. Agreements to Arbitrate and to Give Options.
e. Contracts Involving the Performance of Labor.

B. NEGATIVE CONTRACTS GENERALLY.

a. Involving Personal Service.
b. Limiting the Use of Property.
c. Agreement not to Compete:

1. Express agreements;
2. Agreements implied from sale of good will.

C. RELIEF FOR AND AGAINST THIRD PERSONS.

a. Legal Easements.
b. Certain Covenants Running with Land.
c. Restrictions or Equitable Easements.

D. STATUTE OF FRAUDS — PART PERFORMANCE.
E. PARTIAL PERFORMANCE.
F. TIME THE ESSENCE OF THE CONTRACT.
G. MARKETABLE TITLE.
H. MUTUALITY.
I. NECESSITY AND ADEQUACY OF CONSIDERATION.
J. SUNDRY DEFENSES AND INCIDENTS OF THE REMEDY.

CHAPTER VIII.

PAGES 158 TO 164

INJUNCTIONS.

A. GENERALLY.
B. RESTRAINING LEGAL PROOCEEDINGS AND JUDGMENTS.
C. RESTRAINING ILLEGAL ACTS OF PUBLIC OR CORPORATION OFFICIALS.

CHAPTER IX.

PAGES 165 TO 201

INJUNCTIONS — SPECIFIC REPARATION AND PREVENTION OF TORTS.

A. WASTE.

B. TRESPASS AND DISTURBANCE OF EASEMENTS.

C. NUISANCE.

D. INFRINGEMENT OF PATENTS, COPYRIGHTS AND TRADEMARKS. UNFAIR COMPETITION.

E. INTERFERENCE WITH BUSINESS OR CONTRACT.

CHAPTER X.

PAGES 202 TO 213

PECUNIARY RELIEF IN EQUITY.

A. ACCOUNTING.

B. EXONERATION.

C. CONTRIBUTION.

D. SUBROGATION.

E. MARSHALING.

CASES CITED

A

Aberthaw Construction Co. *v.* Cameron, 194 Mass. 208 . 193, 196, 197, 199, 201
Ackroyd *v.* Smithson, 1 Brown's Ch. 503 78
Adams *v.* Messinger, 147 Mass. 185 . . . 27, 35, 118, 121, 124
Adams *v.* Nichols, 19 Pick 275 88
Adams *v.* Young, 200 Mass. 588 . . . . . 113, 211, 212
Adderley *v.* Dixon, 1 Simons & Stuart 607 119
Aetna Life Ins. Co. *v.* Middleport, 124 U. S. 534 210
Agar *v.* Macklew, 2 Simons & Stuart 418 123
Aleck *v.* Jackson, 49 N. J. Eq. 507 23
Alexander *v.* Tolleston Club, 110 Ill. 65 35
Allen *v.* Allen, 213 Mass. 29 103
Allen *v.* Barrett, 213 Mass. 36 136
Allen *v.* Hunt, 213 Mass. 276 . . . . . 27, 30
Allyn *v.* Allyn, 154 Mass. 570 84
American Bridge Co. *v.* Boston, 202 Mass. 374 59
American Circular Loom Co. *v.* Wilson, 198 Mass. 182 . . 102,190
American Lithograph Co. *v.* Ziegler. 216 Mass. 287 . . . . 54, 56
American Stay Co. *v.* Delany, 211 Mass. 229 190
American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85 186, 188
Anchor Electric Co. *v.* Hawkes, 171 Mass. 101 . . . . 126, 130
Andrews *v.* Mines Corporation, 205 Mass. 121 163
Andrews *v.* Sparhawk, 13 Pick. 393 49
Angier *v.* Webber, 14 Allen 211 131
Anthony *v.* Valentine, 130 Mass. 119 41
Appeal of Wenz, 126 Penn. 541 78
Arndt *v.* Griggs, 134 U. S. 316 37
Arnold *v.* Brown, 24 Pick. 89 18
Aroian *v.* Fairbanks, 216 Mass. 215 151
Asche *v.* Asche, 113 N. Y. 232 78
Ascherson *v.* Tredegar Dry, etc. Co., (1909), L. R. 2 Ch. 404 206
Aspinwall *v.* Boston, 191 Mass. 441 163
Athol Sav. Bank *v.* Bennett, 203 Mass. 480 . . . . . 67, 210
Atkins *v.* Atkins, 195 Mass. 124 . . . . . 13, 14, 46
Atkins *v.* Chilson, 7 Met. 398 177
Atlantic Bank *v.* Tavener, 130 Mass. 407 . . . . . 13, 15
Attaquin *v.* Fish, 5 Met. 140 . . . . . 166, 167
Attorney General *v.* Bedard, 218 Mass. 378 203
Attorney General *v.* Fitzsimmons, 35 Am. Law Reg. 100 . 176
Attorney General *v.* Hunter, 1 Devereux Eq. 12 176
Attorney General *v.* Jamaica Pond Aqueduct, 133 Mass. 361 176
Attorney General *v.* Revere Rubber Co., 152 Mass. 444 . 179
Attorney General *v.* Williams, 174 Mass. 476 176
Ayer *v.* Ayer, 16 Pick. 327 13

B

Bacon, *v.* Sandberg, 179 Mass. 396 . . . . . 138, 141
Badger *v.* Boardman, 16 Gray 559 138

Bailey *v.* Agawam Nat'l Bank, 190 Mass. 20 136
Bailey *v.* Wood, 211 Mass. 37 107
Baker *v.* Davie, 211 Mass. 429 213
Baker *v.* Libbie, 210 Mass. 599 184
Baker *v.* Selden, 101 U. S. 99 183
Baldwin *v.* Wilbraham, 140 Mass. 459 6
Banaghan *v.* Malaney, 200 Mass. 46 116
Barnard *v.* Lee, 97 Mass. 92 . . . . . 148, 149
Barnes *v.* Boardman, 152 Mass. 391 207
Barnes *v.* B. & M. R. R., 130 Mass. 388 . . . . 144, 145, 146,147
Barron *v.* International Trust Co., 184 Mass. 440 112
Barrow *v.* Richard, 8 Paige 351 139
Bartlett *v.* N. Y., N.H., & H. R. R. Co., 221 Mass. 530 . . 164
Bartlett *v.* Slater, 182 Mass. 208 123
Bassett *v.* Percival, 5 Allen 345 131
Bates *v.* Boston El. Ry., 187 Mass. 328 . . . . . 211, 213
Bates *v.* Norcross, 14 Pick. 224 63
Batty *v.* Greene, 206 Mass. 56[1] 99, 111
Bauer *v.* International Waste Co., 201 Mass. 197 30
Baugher *v.* Crane, 27 Md. 36 167
Beal *v.* Brown, 13 Allen 114 212
Beekman *v.* Marsters, 195 Mass. 205 . . . . . 48, 193, 195
Belknap *v* Belknap, 5 Allen 468 44
Bemis *v.* Upham, 13 Pick. 169 175
Benson *v.* Benson, 70 Md. 253 105
Berliner Co. *v.* Seaman, 110 Fed. Rep. 30 124
Bernard *v.* Adams Express Co., 205 Mass. 254 72
Berry *v.* Donovan, 188 Mass. 353 . . . . . 193, 194, 195, 198
Berry *v.* Friedman, 192 Mass. 131 46
Bigelow *v.* Ames, 108 U. S. 10 145
Bigelow *v.* Old Dominion Copper Co., 225 U. S. 111 . 65, 66, 67, 103
Biggert *v.* Straub, 193 Mass. 77 37
Billings *v.* Mann, 156 Mass. 203 . . . . . 28, 98, 99, 172
Bisbee *v.* McKay, 215 Mass. 21 . . . . . 61, 62
Bishop *v.* Palmer, 146 Mass. 469 129
Blake *v.* Traders' Bank, 145 Mass. 13 209
Blanchard *v.* Cooke, 144 Mass. 207 57
Blew *v.* McClelland, 29 Mo. 304 81
Blinn *v.* Dame, 207 Mass. 159 55
Blood *v.* Blood, 23 Pick, 80 63
Blood *v.* Blood, 110 Mass. 545 20
Blout *v.* Société Anonyme, 53 Fed. Rep. 98 182
Blount *v.* Wheeler, 199 Mass. 330 119
Boardman *v.* Jackson, 119 Mass. 161 28
Bodman *v.* American Tract Soc., 9 Allen 447 21
Bolivar Mfg. Co. *v.* Neponset Mfg. Co., 16 Pick. 247 . . . 179
Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69 . . 159
Boston Ferrule Co. *v.* Hills, 159 Mass. 147 . . . . . 174, 180
Boston & Maine R. R. *v.* Sullivan, 177 Mass. 230 . 25, 169 171
Boston & Worcester St. Ry. Co. *v.* Rose, 194 Mass. 142 . . 149

Boutelle *v.* Smith, 116 Mass. 111 132
Bowen *v.* N. Y. C. & H. R. R., 202 Mass. 263 54
Bowker *v.* Torrey, 215 Mass. 547 19
Boyden *v.* Hill, 198 Mass. 477 93
Brackett *v.* Perry, 201 Mass. 502 . . . . . 99, 109
Brady *v.* Waldron, 2 Johns, Ch. 148 167
Brainard *v.* Conn. River Ry. Co., 7 Cush. 506 176
Brande *v.* Grace, 154 Mass. 210 170
Breed *v.* Berenson, 216 Mass. 397 155
Brewer *v.* Boston Theatre, 104 Mass. 378 164
Brewer *v.* Herbert, 30 Md. 301 84
Bresnihan *v.* Sheehan, 125 Mass. 11 15
Bridge *v.* Conn. Mutual Life Ins. Co., 152 Mass. 343 . . 43, 44
Bridgewater Iron Co. *v.* Enterprise Ins. Co., 134 Mass. 433 92
Brierly *v.* Equitable Aid Union, 170 Mass. 218 . . . . .23, 57
Briggs *v.* Sanford, 219 Mass. 572 107
Brinkman *v.* Jones, 44 Wisc. 498 62
Brock *v.* Dole, 66 Wisc. 140 167
Bronson *v.* Coffin, 108 Mass. 175 136
Brookline *v.* Mackintosh, 133 Mass. 215 178
Brooks *v.* Brooks, 169 Mass. 38 . . . . . 45, 46
Brooks *v.* Rosenbaum, 217 Mass. 172 170
Brown *v.* Brown, 174 Mass. 197 15
Brown *v.* Corey, 191 Mass. 189 203
Brown *v.* Statter, 206 Mass. 119 . . . . . .100, 111, 112
Brown *v.* Thissel, 6 Cush. 254 134
Browne *v.* Niles, 165 Mass. 276 180
Brownell *v.* White, 87 Md. 54 46
Bruce *v.* Bonney, 12 Gray 107 94
Bubb's Case, Freeman Ch. 38 82
Burk *v.* Schreiber, 183 Mass. 35 152
Burlen *v.* Shannan, 99 Mass. 200 66
Burleson *v.* Woodin, 212 Mass. 323 99
Burnham *v.* Dowd, 217 Mass. 351 . . . . . .159, 193, 197, 198
Burns *v.* Daggett, 141 Mass. 368 . . . . . .144, 146
Burns *v.* Thayer, 115 Mass. 89 51
Burrowes *v.* Locke, 10 Ves. 471 100
Burrows-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53 . 183
Burt *v.* Tucker, 178 Mass. 493 . . . . . 185, 187
Busiere *v.* Reilly, 189 Mass. 518 . . . . . 56, 105, 112
Butcher *v.* Stapley, 1 Vernon 363 147
Butler *v.* Gleason, 214 Mass. 248 . . . . . 103, 110
Butterick Pub. Co. *v.* Fisher, 203 Mass. 122 . . 45, 117, 126, 128
Button *v.* Schroyer, 5 Wisc. 598 . . . . . 80, 81

C

C. A. Briggs Co. *v.* Nat'l Wafer Co., 215 Mass. 100 . . 188, 191
Cadman *v.* Horner, 18 Vesey 10 155
Caldwell *v.* Nash, 190 Massy 507 13
California Fig Syrup Co. *v.* Stearn, 73 Fed. Rep. 312 . . . 48

Callaghan *v.* Myers, 128 U. S. 617 183
Campbell *v.* Cook 193 Mass. 251 202
Campbell *v.* Dearborn, 109 Mass. 130 42
Campbell *v.* Lima, 212 Mass. 11 101
Campbell *v.* Seaman, 63 N. Y. 568 174
Canedy *v.* Marcy, 13 Gray 373 . . . . . 94, 96
Cannon *v.* Barney, 59 Miss. 289 167
Canton Co-operative Bank *v.* American Central Ins. Co., 219 Mass. 132 . 76
Capen *v.* Barrows, 1 Gray 376 16
Carew *v.* Rutherford, 106 Mass. 1 . . . . . 191, 197
Carleton *v.* Rugg, 149 Mass. 550 176
Carr *v.* Silloway, 105 Mass. 543 . . . . . 20, 25
Carson *v.* Dunham, 149 Mass. 52 . . . . . 35, 161
Carter *v.* Ferguson, 58 Hun. 569 127
Carter *v.* Phillips, 144 Mass. 100 150
Carter *v.* Tanner's Leather Co., 196 Mass. 163 . . . . . 212, 213
Carteret *v.* Petty, 2 Swanston 323 35
Cary *v.* Holmes, 16 Gray 127 207
Case *v.* Minot, 158 Mass. 577 179
Cassidy *v.* Mason, 171 Mass. 507 136
Castlemain *v.* Craven, 22 Viner's Abr. 523 167
Central Nat'l Bank *v.* Copp. 184 Mass. 328 71
C. E. Worden & Co. *v.* California Fig Syrup Co., 187 U. S. 516 187
Chadwick *v.* Covell, 151 Mass. 190 . . . . . 53, 127, 185, 187
Chamberlain *v.* Walker, 10 Allen 429 17
Chandler *v.* Brainard, 14 Pick. 285 212
Chandler *v.* McDonald-Weber Co., 215 Mass. 365 123
Chapman *v.* Banker & Tradesman Co., 128 Mass. 478 . . . 31
Chapman *v.* Cole, 12 Gray 141 92
Chase *v.* Phillips, 208 Mass. 245 . . . . . 103, 107
Chesman *v.* Cummings, 142 Mass. 65 151
Chicago St. Co. *v.* Car Co., 139 U. S. 79 210
Childs *v.* Boston & Maine R. R., 213 Mass. 91 . . . 135, 136, 141
Church *v.* Winton, 196 Penn. 107 42
Chute *v.* Quincy, 156 Mass. 189 . . . . . 93, 95, 116, 155
Citizens' Loan Ass'n *v.* B. & M. R.R., 196 Mass. 528 . . . 126
City Bank of New Haven *v.* Wilson, 193 Mass. 164 60
Clark *v.* Delano, 205 Mass. 224 102
Clark *v.* Flint, 22 Pick. 231 . . . . . 27, 28, 120
Clark *v.* Holden, 7 Gray 8 166
Clark *v.* McMahon, 170 Mass. 92 107
Clark *v.* Patterson, 158 Mass. 388 14
Clark *v.* Storey, 208 Mass. 36 . . . . . 112, 204
Clarke *v.* Fay, 205 Mass. 228 56
Clarke *v.* Ramuz, L. R. 1891, 2 Q. B. 456 83
Clayton *v.* Ashdown, 9 Viner's Abr. 393 152
Clerk *v.* Boston, 179 Mass. 409 93
Clermont *v.* Tasburgh, 1 J. & W. 112 156
Coates *v.* Lunt, 210 Mass. 314 87
Coates *v.* Lunt, 213 Mass. 401 . . . . . 94, 96

Coats *v.* Merrick Thread Co., 149 U. S. 562 189
Cobb *v.* Rice, 130 Mass. 231 20
Codman *v.* Bradley, 201 Mass. 361 . . . . . 141, 143
Cogent *v.* Gibson, 33 Beavan 557 119
Coggan *v.* Ward, 215 Mass. 13 105
Coggswell *v.* Newburyport Inst. for Sav., 165 Mass. 524 . 21
Colby *v.* Shute, 219 Mass. 213 63
Cole *v.* Bates, 186 Mass. 584 202
Cole *v.* Killam, 187 Mass. 213 149
Cole *v.* N. E. Trust Co., 200 Mass. 594 73
Cole *v.* Reynolds, 18 N. Y. 74 16
Coles *v.* Trecothick, 9 Vesey 234 154
Colonial Development Co. *v.* Bragdon, 219 Mass. 170 . . . 113
Conant *v.* Boston Chamber of Commerce, 201 Mass. 479 . 66
Conant *v.* Evans, 202 Mass. 34 73
Conn. Mut. Life Ins. Co. *v.* Cook, 219 Mass. 222 . . . . . 21, 22
Connell *v.* Reed, 128 Mass. 477 48
Counihan *v.* Thompson, 111 Mass. 270 . . . . . 75, 155
Consolidated Elec. Storage Co. *v.* Accumulator Co., 55 Fed. Rep. 485 . 182
Cook *v.* Scheffren, 215 Mass. 444 . . . . . 98, 110
Corbett *v.* Boston & Maine R. R., 219 Mass. 351 75
Corliss *v.* E. W. Walker Co., 64 Fed. Rep. 280 184
Cotting *v.* Otis Elevator Co., 214 Mass. 294 207
Cottrell *v.* Babcock Co., 54 Conn. 122 130
County Commissioners of Hampshire, Petitioners, 143 Mass. 424 51
Covell *v.* Chadwick, 153 Mass. 263 187
Cox *v.* Malden & Melrose Gas Lt. Co., 199 Mass. 324 . . . 29
Crabtree *v.* Miller, 194 Mass. 123 172
Creeden *v.* Mahoney, 193 Mass. 402 157
Creely *v.* Bay State Brick Co., 103 Mass. 514 29
Cressey *v.* Cressey, 215 Mass. 65 69
Crockford *v.* Alexander, 15 Vesey 138 83
Crompton *v.* Anthony, 13 Allen 33 105
Crompton *v.* Pratt, 105 Mass. 255 205
Cromwell *v.* Norton, 193 Mass. 291 . . . . . 31, 157
Cromwell *v.* Parsons, 219 Mass. 299 160
Cronin *v.* Bloemecke, 58 N. J. Eq. 313 181
Crosby *v.* Clem, 209 Mass. 193 12
Crower *v.* Crower, 29 Grattan 280 209
Culbert *v.* Hall, 181 Mass. 24 34
Cunningham *v.* Pattee, 99 Mass. 248 68
Curran *v.* Holyoke Water Power Co., 116 Mass. 90 . . . 116
Curre *v.* Bowyer, 5 Beavan 6 81
Curtis *v.* Mundy, 3 Met. 405 62
Curtis Mfg. Co. *v.* Spencer Wire Co., 203 Mass. 448 . . 170, 174
Curtiss *v.* Sheffield, 213 Mass. 239 45
Cutler *v.* Dickinson, 8 Pick. 386 68
Cutter *v.* Cutter, 215 Mass. 94 78

D

Daly *v.* Foss, 199 Mass. 104 141
Dana *v.* Third Nat'l Bank, 13 Allen 445 59
Dana *v.* Valentine, 5 Met. 8 179
Dana *v.* Wentworth, 111 Mass. 291 137
Daniels *v.* Keokuk Water Co., 61 Iowa 549 178
Daniels *v.* Tearney, 102 U. S. 415 70
Davidson *v.* Sohier, 220 Mass. 270 141
Davis *v.* Alden, 2 Gray 309 88
Davis *v.* Bodlam, 165 Mass. 248 79
Davis *v.* Chicago Dock Co. 129 Ill. 180 101
Davis *v.* N. E. Railway Pub. Co., 203 Mass. 470 194
Davis *v.* Newton, 6 Met. 537 16
Day *v.* Cooley, 118 Mass. 524 106
Dean *v.* Emerson, 102 Mass. 480 . . . . . 130, 132
Dean *v.* Mitchell, 4 J. J. Marshall (Ky.) 451 83
Dean *v.* Toppin, 130 Mass. 517 211
Deans *v.* Eldredge, 217 Mass. 583 . . . . . 68, 69, 70
Dearle *v.* Hall, 3 Russell 1 . . . . . 44, 60
Debbins *v.* Foster, 219 Mass. 370 75
Deere *v.* Guest, 1 Mylne & Craig 516 171
Dehon *v.* Foster, 4 Allen 545 . . . . . 35, 160, 161
Delano *v.* Smith, 206 Mass. 365 . . . . . 165, 166, 168
Delval *v.* Gagnon, 213 Mass. 203 55
De Minico *v.* Craig, 207 Mass. 593 . . . . . 196, 197
Denholm *v.* McKay, 148 Mass. 434 51
Dering *v.* Earl Winchelsea, 1 Cox 318 (n) 48
Deshon *v.* Wood, 148 Mass. 132 107
Detroit *v.* Detroit Citizens' St. Ry. Co., 184 U. S. 368 29
Dexter *v.* Codman, 148 Mass. 421 33
Dexter *v.* Fuller, 217 Mass. 219 110
Diamond Match Co. *v.* Roeber, 106 N. Y. 473 130
Dickerson *v.* Colgrove, 100 U. S. 578 74
Dickerson *v.* De la Vergne etc. Co., 35 Fed. Rep. 143 182
Dickey *v.* Reed, 78 Ill. 262 40
Dietrichsen *v.* Cabburn, 2 Phillips 52 128
Dillon *v.* Heller. 39 Kan. 599 . . . . . 34, 37
Ditrell *v.* Carlisle, 48 Miss. 691 42
Doane *v.* Preston, 183 Mass. 571 50
Dodge *v.* Essex Ins. Co., 12 Gray 65 42
Doherty *v.* Allman, L. R. 3 App. Cases 709 168
Dole *v.* Wooldredge, 142 Mass. 161 33
Donaldson *v.* Strong, 195 Mass. 429 60
Dooley *v.* Cheshire Glass Co., 15 Gray 494 70
Dooley *v.* Merrill, 216 Mass. 500 83
Dooley *v.* Wolcott, 4 Allen 406 68
Doolittle *v.* Dwight, 2 Met. 561 212
Dowling *v.* Betjemann, 2 Johnson & Hemming 544 120
Downey *v.* Gove, 201 Mass. 251 47
Downey *v.* Hood, 203 Mass. 4 . . . . . 71, 172

Downing *v.* Elliott, 182 Mass. 28 . . . . . 174, 175
Dover Stamping Co. *v.* Fellows, 163 Mass. 191 . . . . . 186, 189
Drake *v.* Rice, 130 Mass. 410 104
Drake *v.* Taylor, 203 Mass. 528 174
Dresel *v.* Jordan, 104 Mass. 407 152
Drexel *v.* Berney, 122 U. S. 241 74
Duffy *v.* Hogan, 203 Mass. 397 123
Duke of Somerset *v.* Cookson, 2 P. Wms. 390 119
Dun *v.* Lumbermen's Credit Ass'n, 209 U. S. 20 183
Duncan *v.* Goldthwaite, 216 Mass. 402 173
Duncuft *v.* Albrecht, 12 Simons 189 121
Dunham *v.* Presby, 120 Mass. 285 . . . . . 29, 47
Dwight *v.* Hamilton, 113 Mass. 175 . . . . . 131, 132
Dwyer *v.* N. Y., N. H. & H. R. R., 209 Mass. 419 176
Dyer *v.* Hargrave, 10 Vesey 505 148
Dzuris *v.* Pierce, 216 Mass. 132 . . . . . 91, 93, 97

E

Eastern Bridge Co. *v.* Worcester Auditorium Co., 216 Mass. 426 . . . . . 37, 116
East India Co. *v.* Vincent, L. R. 35 Ch. D. 694 147
Eaton *v.* Eaton, 15 Wisc. 259 95
Eaton *v.* Locke, 202 Mass. 324 . . . . . 176, 177
Echelkamp *v.* Schrader, 45 Mo. 505 169
Eddy *v.* Fogg, 192 Mass. 543 42
Edwards *v.* Allonez Mining Co., 38 Mich. 46 178
Edwards *v.* Willey, 219 Mass. 443 203
Edward Thompson Co. *v.* American Law Book Co., 122 Fed. Rep. 922 183
Ela *v.* Ela, 158 Mass. 54 43
Eldredge *v.* Mutual Life Ins. Co., 217 Mass. 444 104
Eliot Five Cents Sav. Bank *v.* Commercial Union Ass. Co., 142 Mass. 142 76
Ellis *v.* Boston H. & E. Co., 107 Mass. 1 43
Elmore *v.* Symonds, 183 Mass. 321 43
Emerson *v.* Atkinson, 159 Mass. 356 17
Emerson *v.* Cutler, 14 Pick. 108 79
Emerson *v.* Udall, 13 Vt. 477 161
Endicott *v.* University of Virginia 182 Mass. 156 58
Ensign *v.* Kellogg, 4 Pick. 1 117
Equitable Gas Lt. Co. *v.* Baltimore Coal Tar Co., 63 Md. 285 120
Erhardt *v.* Boaro, 113 U. S. 537 . . . . . 169, 171
Essex Trust Co. *v.* Enwright, 214 Mass. 507 . . . . . 103, 190
Evans *v.* Wall, 162 Mass. 478 62
Evans *v.* Foss, 194 Mass. 513 142
Ewald *v.* Ewald, 219 Mass. 111 46

F

Fairbanks *v.* Belknap, 135 Mass. 179 21
Fairfield *v.* Lowry, 207 Mass. 352 133
Falardeau *v.* Washburn, 199 Mass. 363 202
Fairbanks *v.* McDonald, 219 Mass. 291 . . . . . 66, 198, 200
Fales *v.* Russell, 16 Pick. 315 . . . . . 7, 86
Fall *v.* Eastin, 215 U. S. 1 35
Fall River *v.* Aetna Ins. Co., 219 Mass. 454 76
Farnum *v.* Bascom, 122 Mass. 282 208
Farrar *v.* Pillsbury, 217 Mass. 330 27
Federal Trust Co. *v.* Bristol Co. St. Ry., 218 Mass. 63 . . 68
Felch *v.* Hooper, 119 Mass. 52 . . . . . 37, 81
Ferguson *v.* Jackson, 180 Mass. 557 8
Ferry *v.* Stephens, 66 N. Y. 321 154
Ferris *v.* Frohman, 223 U. S. 424 184
Finnish Temperance Soc. *v.* Raivaaja Pub. Co., 219 Mass. 28 159
First A. M. E. Soc. *v.* Brown, 147 Mass. 296 151
Fiske *v.* Doucette, 206 Mass. 275 46
Fitcher *v.* Griffiths, 216 Mass. 174 210
Flagg Mfg. Co. *v.* Holway, 178 Mass. 83 189
Flight *v.* Bollard, 4 Russell 299 152
Flint *v.* Brandon, 7 Vesey 159 125
Florence Mining Co. *v.* Brown, 124 U. S. 385 59
Florence Sewing Machine Co. *v.* Grover, etc. Co., 110 Mass. 1 120
Flynn *v.* Butler, 189 Mass. 377 55
Flynn *v.* Howard, 218 Mass. 245 66
Fogg *v.* Price, 145 Mass. 513 123
Forest River Lead Co. *v.* Salem, 165 Mass. 193 22
Forster Mfg. Co. *v.* Cutter-Tower Co., 215 Mass. 136 . . 190, 191
Foss *v.* Roby, 195 Mass. 292 . . . . . 131, 132
Foster, etc. Co. *v.* Sayles, 213 Mass. 319 151
Fothergill *v.* Rowland, L. R. 17 Eq. 132 . . . . . 118, 128
Fourth Nat'l Bank *v.* Mead, 214 Mass. 549 . . . . . 29, 105
Fowle *v.* Torrey, 135 Mass. 87 . . . . . 13, 41
Fowler *v.* Strickland, 107 Mass. 552 211
Francisco *v.* Smith, 143 N. Y. 488 137
Frank *v.* Sleeper, 150 Mass. 583 . . . . . 185, 186, 187
Frankel *v.* Frankel, 173 Mass. 214 . . . . . 13, 14
Franklin *v.* Greene, 2 Allen 519 33
Freeman *v.* Freeman, 136 Mass. 260 18
French *v.* Boston Nat'l Bank, 179 Mass. 404 119
French *v.* Conn. River Lumber Co., 145 Mass. 261 177
French *v.* Peters, 177 Mass. 568 . . . . . 53, 54
Frith *v.* Sprague, 14 Mass. 455 212
Frost *v* .Jacobs, 204 Mass. 1 172
Frost *v.* Thompson, 219 Mass. 360 . . . . . 66, 67, 75
Fuller *v.* Melrose, 1 Allen 166 50
Fuller *v.* Percival, 126 Mass. 381 . . . . . 98, 110
Furbur *v.* Dane, 203 Mass. 108 206
Furnald *v.* Glenn, 64 Fed. Rep. 49 162
F. W. Dodge Co. *v.* Construction Inform. Co., 183 Mass. 62 127, 184

G

Gaff *v.* Cornwallis, 219 Mass. 226 119
Gahn *v.* Wallace, 206 Mass. 39 36
Galligan *v.* McDonald, 200 Mass. 299 . . . . . 118, 151
Galway *v.* Met. Elev. Ry. Co., 128 N. Y. 132 . . . . . 178, 179
Gamewell Fire Alarm Telegraph Co. *v.* Crane, 160 Mass. 50 129
Garcin *v.* Penn. Furnace Co., 186 Mass. 405 150
Gardner *v.* Denison, 217 Mass. 492 67
Gardner *v.* Ogden, 22 N. Y. 327 35
Gargano *v.* Pope, 184 Mass. 571 . . . . . 8, 48, 102
Gates *v.* Johnston Lumber Co., 172 Mass. 495 . . . . . 168, 169
Gay *v.* Gay, 5 Allen 157 205
Gaylord *v.* Pelland, 169 Mass. 356 94
George *v.* Kent, 7 Allen 16 62
Geo. G. Fox Co. *v.* Best Baking Co., 209 Mass. 251 . . . . 48, 189
Geo. G. Fox Co. *v.* Glynn, 191 Mass. 344 189
Geo. G. Fox Co. *v.* Hathaway, 199 Mass. 99 189
Georgia *v.* Tennessee Copper Co., 237 U. S. 474 . . . . . 174, 177
German *v.* Grim, 32 Ind. 255 95
German-American Ins. Co. *v.* Davis, 131 Mass. 316 . . . . 95, 97
Gibbens *v.* Peeler, 8 Pick. 254 111
Gibson *v.* Cooke, 1 Met. 75 79
Gibson *v.* Supervisors, 80 Cal. 363 40
Gilchrist *v.* Railroad Co., 58 Fed. 708 40
Gilman *v.* American Prod. Con. Co., 180 Mass. 319 54
Gilman *v.* Hunnewell, 122 Mass. 139 186
Glass *v.* Hulbert, 102 Mass. 24 . . . . . 97, 144, 145
Globe Newspaper Co. *v.* Walker, 210 U. S. 356 184
Gloucester Isinglass, etc. Co. *v.* Russia Cement Co., 154 Mass. 92 120
Goldman *v.* Rosenberg, 116 N. Y. 78 84
Goldsmith *v.* Guild, 10 Allen 239 150
Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418 . . . 197
Goode *v.* Riley, 153 Mass. 585 94
Goodenough *v.* Labrie, 206 Mass. 599 73
Goodrich *v.* Burbank, 12 Allen 459 133
Goodson *v.* Richardson, L. R. 9 Ch. App. 221 . . . . . 169, 172
Gorton Pew Fish Co. *v.* Tolman, 210 Mass. 402 134
Gould *v.* Emerson, 160 Mass. 438 . . . . . 91, 92, 96
Graffam *v.* Burgess, 117 U. S. 192 100
Gragg *v.* Martin, 12 Allen 498 104
Granara *v.* Italian Cath. Cem. Ass'n, 218 Mass. 387 . . . 163, 164
Granger *v.* Parker, 137 Mass. 228 70
Graves *v.* Goldthwaite, 153 Mass. 268 144
Gray *v.* Bartlett, 20 Pick. 186 70
Great Falls Mfg. Co. *v.* Worcester 23 N. H. 462 35
Green *v.* Smith, 1 Atkyns 572 82
Greene *v.* Fitchburg, 219 Mass. 121 164
Greenhood *v.* MacDonald 183 Mass. 342 27
Griffen *v.* Kelleher, 132 Mass. 82 207

Griswold *v.* Hazard, 141 U. S. 260 . . . . . 38, 90
Grocers' Supply Co. *v.* Dupuis, 219 Mass. 576 188
Grover *v.* Grover, 24 Pick. 261 . . . . . 52, 53
Guild *v.* Butler, 127 Mass. 386 208

H

Hagar *v.* Norton, 188 Mass. 47 110
Hall *v.* Hardy, 3 P. Wms. 187 123
Hallett *v.* Cumston, 110 Mass. 29 204
Hamilton *v.* St. Louis Bank, 3 Dillion 230 121
Hammond *v.* Allen, 11 Peters 63 91
Hammond *v.* Putnam, 110 Mass. 232 . . . . . 23, 77, 78
Handforth *v.* Jackson, 150 Mass. 149 130
Hano *v.* Bigelow, 155 Mass. 341 138
Hanson *v.* Griswold, 221 Mass. 10
Harmon *v.* Weston, 215 Mass. 242 212
Harrell *v.* Sonnabend, 191 Mass. 310 147
Harrigan *v.* Dodge, 200 Mass. 357; 216 Mass. 461 . . . . 156, 157
Harrington *v.* McCarthy, 169 Mass. 492 171
Harris *v.* Graham, 110 Fed. Rep. 896 34
Harrison *v.* Glucose Sugar Ref. Co., 116 Fed. Rep. 304 . . 127
Harrison *v.* Pepper, 166 Mass. 288 167
Hart *v.* Leonard, 42 N. J. Eq. 416 . . . . . 167, 171
Hart *v.* Sansom, 110 U. S. 151 34
Hart *v.* Weston R.R. Co., 13 Met. 99 210
Harvey *v.* Squire, 217 Mass. 411 110
Harvey *v.* Varney, 98 Mass. 118 . . . . . 47, 112
Haskell *v.* Blair, 3 Cush. 534 56
Haskell *v.* Cunningham, 221 Mass. 49, 65
Hatton *v.* Gray, 2 Cas. in Ch. 164 153
Haven *v.* Foster, 9 Pick. 112 . . . . . 90, 93
Haverhill Sav. Bank *v.* Griffin, 184 Mass. 419 139
Hawes *v.* Lothrop, 38 Cal. 493 79
Hawkes *v.* Kehoe, 193 Mass. 419 84
Hawkes *v.* Lackey, 207 Mass. 425 . . . . . 102, 103
Hawley *v.* Clowes, 2 Johns. Ch. 122 166
Hayden *v.* Cabot, 17 Mass. 169 206
Haynes *v.* Nice, 100 Mass. 327 205
Hayward *v.* Brunswick, etc. Society, 3 Q. B. D. 403 . . . 140
Hazen *v.* Matthews, 184 Mass. 388 139
Heard *v.* Stanford, Cases *temp.* Talbot 173 41
Hecht *v.* Batchelder, 147 Mass. 335 92
Heckard *v.* Sayre, 34 Ill. 142 150
Hedges *v.* Dixon County, 150 U. S. 182 41
Heine *v.* Commissioners, 19 Wall. 655 40
Hendrick *v.* Whittemore, 105 Mass. 23 207
Hendrickson *v.* Hinckley, 17 Howard 443 160
Hennessy *v.* Carmony, 50 N. J. Eq. 616 . . . . . 178, 181
Hennessy *v.* Preston, 219 Mass. 61 41
Henry *v.* A. B. Dick Co., 224 U. S. 1 129

Herbert *v.* Bronson, 125 Mass. 475 56
Herbert *v.* Simpson, 220 Mass. 480 . . . . . 52, 53
Herbst *v.* Fidelia, etc. Corp's, 218 Mass. 181 119
Herman *v.* Conn. Mutual Life Ins. Co., 218 Mass. 181 . 74, 44, 53, 55, 60
Hermann *v.* Hodges, L. R. 16 Eq. 18 121
Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554 187
Hewins *v.* Baker, 161 Mass. 320 53
Hewitt *v.* Hayes, 205 Mass. 356 . . . . . 202, 206
Hill *v.* Hall, 191 Mass. 253 . . . . . 102, 111
Hill *v.* Lane, L. R. 11 Eq. 215 98
Hill *v.* Sayles, 12 Cush. 454 175
Hill Mfg. Co. *v.* Prov. & N. Y. S. Co., 113 Mass. 495 . . 162
Hinchley *v.* Greaney, 118 Mass. 595 72
Hinsdale *v.* Bank of Orange, 6 Wendell 678 87
Hittinger Fruit Co. *v.* Cambridge, 218 Mass. 220 175
Hoban *v.* Dempsey, 217 Mass. 166 . . . . . 193, 195, 198, 201
Hodge *v.* Cole, 140 Mass. 116 94
Hodge *v.* Sloan, 107 N. Y. 244 139
Hodgson *v.* Duce, 2 Jur. n. s. 1014 172
Hogan *v.* Barry, 143 Mass. 538 134
Holbrook *v.* Bliss, 9 Allen 69 . . . . . 5, 7
Holbrook *v.* Morrison, 214 Mass. 209 194
Holbrook *v.* Payne, 151 Mass. 383 59
Holden *v.* Hoyt, 134 Mass. 181 111
Holland *v.* Cruft, 3 Gray 162 77–79
Holman *v.* Updike, 208 Mass. 466 74
Holmes *v.* Darling, 213 Mass. 203 17
Holmes *v.* Winchester, 133 Mass. 140 . . . . . 13, 14, 15, 106, 121
Holt *v.* Holt, 2 Vernon 322 125
Hood *v.* North Eastern Ry. Co., L. R. 8 Eq. 666 124
Hopkins *v.* Smith, 162 Mass. 444 139
Horton *v.* McCoy, 47 N. Y. 21 79
Houghton *v.* Kendall, 7 Allen 72 22
Hovey *v.* Dary, 154 Mass. 7 77
Howe *v.* Conley, 16 Gray 552 156
Howe *v.* Howe, 199 Mass. 598 68
Howe *v.* Nickerson, 14 Allen 400 123
Howe *v.* Watson, 179 Mass. 30 . . . . . 119, 153
Hoxie *v.* Chaney, 143 Mass. 592 . . . . . 131, 132, 187
Hubbell *v.* Warren, 8 Allen 173 144
Hughes *v.* Williams, 218 Mass. 448 . . . . . 62, 64
Huguinon *v.* Basley, 15 Vesey 273 102
Hunt *v.* Rousmaniere's Adm'r., 1 Peters 1 89
Hunter *v.* Boston, 218 Mass. 535 40
Hunter *v.* Carroll, 64 N. H. 572 171
Huntress *v.* Blodgett, 206 Mass. 318 109
Huntress *v.* Hanley, 195 Mass. 236 . . . . . 73, 107
Hutchins *v.* Mead, 220 Mass. 348 108
Hutchins *v.* Page, 204 Mass. 284 . . . . . 133, 202
Hutchinson *v.* Nay, 187 Mass. 262 133

I

In re Barker, 17 Ch. Div. 241 79
In re David, (1889) 1 Ch. Div. 378 132
In re Debs, 158 U. S. 564 201
In re Leeds Woolen Mills, 129 Fed. Rep. 922 168
In re Shoenberger, 221 Penn. 112 80
Inst. for Sav. etc. *v.* Puffer, 201 Mass. 41 . . . . . 66, 116
Ipswich *v.* Prop'rs Jeffries Neck, etc., 218 Mass. 487 . . . 51

J

Jackson *v.* Stevenson, 156 Mass. 496 . . . . . 116, 140, 141
Jacobs *v.* Beecham, 221 U. S. 263 . . . . . 187, 188
Jacobs *v.* Hesler, 113 Mass. 157 15
James *v.* Newton, 142 Mass. 366 58
Jenkins *v.* Wood, 145 Mass. 494 165
Jefferys *v.* Jefferys, Craig & Phillips 139 154
Jeffries *v.* Jeffries, 117 Mass. 184 151
Jennings *v.* Wall, 217 Mass. 278 . . . . . 67, 70
Jewell *v.* Lee, 14 Allen 145 142
John Bros. Abergarw Brewery Co. *v.* Holmes, L. R. (1900) 1 Ch. 188 . 129, 137
Johnson *v.* Bartlett, 17 Pick. 477 210
Johnson *v.* Scott, 205 Mass. 294 . . . . . 35, 49, 99
Johnson *v.* Thompson, 129 Mass. 398 68
Johnston *v.* Hall, 2 K. & J. 414 141
Jones *v.* Arena Pub. Co., 171 Mass. 22 41
Jones *v.* Newhall, 115 Mass. 244 . . . . . 25, 28, 118
Jones *v.* Parker, 163 Mass. 564 125
Jones *v.* Witter, 13 Mass. 304 54
Joslyn *v.* Adams, 5 Allen 62 45
J. P. Eustis Mfg. Co. *v.* Saco Brick Co., 198 Mass. 212 . 8, 90, 95, 97

K

Kansas, etc. Co. *v.* Topeka, etc., Co., 135 Mass. 34 125
Kaufman *v.* Cook, 114 Ill. 11 146
Keefe *v.* Fairfield, 184 Mass. 334 . . . . . 150, 157
Kelley *v.* Allin, 212 Mass. 327 102
Kelley *v.* Sullivan, 201 Mass. 34 164
Kelley *v.* Thompson, 181 Mass. 122 118
Kelley-Buckley Co. *v.* Cohen, 195 Mass. 585 61
Kelly *v.* Central Pacific R. R. Co., 74 Cal. 557 155
Kempson *v.* Kempson, 58 N. J. Eq. 94 . . . . . 35, 161
Kendall *v.* Hardy, 208 Mass. 20 172
Kennedy *v.* Owen, 136 Mass. 199 135
Kennedy *v.* Poole, 213 Mass. 495 . . . . . 95, 96
Kenney *v.* Consumers' Gas Co., 142 Mass. 417 . . . . . 29, 178
Kerr *v.* Shurtleff, 218 Mass. 167 99
Kershaw *v.* Merritt, 194 Mass. 113 15-74
Kershishian *v.* Johnson, 210 Mass. 135 170

Killian *v.* Ebbinghans, 110 U. S. 568 23
King *v.* Cram, 185 Mass. 103 104
King *v.* Dickeson, L. R. 40 Ch. Div. 596 142
King *v.* Wight, 155 Mass. 444 . . . . . 134, 135
Kingman *v.* Perkins, 105 Mass. 111 59
Kingsbury *v.* Burrill, 151 Mass. 199 57
Kirsch *v.* Tozier, 143 N. Y. 390 62
Kneil *v.* Egleston, 140 Mass. 202 12
Koehl *v.* Burrell, 11 Ch. Div. 140 173
Kohn *v.* McNulta, 147 U. S. 238 33
Kurinsky *v.* Lynch, 201 Mass. 28 155
Kyle *v.* Kavanagh, 103 Mass. 356 91

L

Labbe *v.* Bernard, 196 Mass. 551 . . . . . 207, 210
Labouchere *v.* Dawson, L. R. 13 Eq. 322 130
Ladd *v.* Chase, 155 Mass. 417 21
Lamb *v.* Montague, 112 Mass. 352 210
Lamb *v.* Pierce. 131 Mass. 72 62
Lamson Consol. etc. Co. *v.* Prudential Fire Ins. Co., 171 Mass. 433
122
Lane *v.* Concord, 70 N. H. 485 175
Lane *v.* Newdigate, 10 Vesey 192 125
Lawton *v.* Estes, 167 Mass. 181 47
Leach *v.* Fobes, 11 Gray 506 27
Lechmere *v.* Earl of Carlisle, 3 P. Wms. 215 77
Lee *v.* Kirby, 104 Mass. 420 154
Leeds, etc. Co. *v.* Victor Talking Mach. Co., 213 U. S. 301 . 182
Leonard *v.* Bolton, 153 Mass. 428 105
Leverett *v.* Barnwell, 214 Mass. 105 58
Levi *v.* Worcester Consol. St. Ry., 193 Mass. 116 . . . 116, 173
Levin *v.* Goodwin, 191 Mass. 341 181
Lexington Print Works *v.* Canton, 171 Mass. 414 . . . 31, 179
Lilley *v.* Fifty Associates, 101 Mass. 432 . . . . . 71, 88
Lima *v.* Campbell, 219 Mass. 253 . . . . . 66, 110, 113
Lincoln *v.* Burrage, 177 Mass. 380 . . . . . 135, 140
Lincoln *v.* Gay, 164 Mass. 537 . . . . . 72, 73
Lipsky *v.* Heller, 199 Mass. 310 173
Little *v.* Phoenix Ins. Co., 123 Mass. 380 76
Livermore *v.* Boutelle, 11 Gray 217 105
Livingstone *v.* Murphy, 187 Mass. 315 92
Lloyd *v.* Rippingale, 1 Yonnge & Collyer, Escheq. 410 . . . 150
Lohdell *v.* Hayes, 4 Allen 187 83
Locke *v.* Homer, 131 Mass. 93 211
Lombard *v.* Morse, 155 Mass. 136 14
Long *v.* Athol, 196 Mass. 497 . . . . . 30, 92, 94
Longley *v.* Griggs, 10 Pick. 121 208
Longyear *v.* Hardman, 219 Mass. 405 163
Lothrop Pub. Co. *v.* Lothrop, etc. Co., 191 Mass. 353 . . . 133
Loud *v.* Pendergast, 206 Mass. 122 . . . . . 47, 50, 141, 143
Loughery *v.* Huxford, 206 Mass. 324 194

Lovejoy *v.* Bailey, 214 Mass. 134 . . . . . 19, 47, 112
Lowell Inst. for Sav. *v.* Lowell, 153 Mass. 530 138
Lowndes *v.* Beetle, 33 L. J. Ch. 451 . . . . . 168, 169
Lowther *v.* Lord Lowther, 13 Vesey 95 118
Lucas *v.* Barrett, 1 Greene (Ia.) 510 44
Lufkin *v.* Jakeman, 188 Mass. 528 . . . . . 48, 108
Lumley *v.* Wagner, 1 De Gex, McN. & G. 604 126
Lurie *v.* Pinanski, 215 Mass. 229 . . . . . 17, 49, 113
Lynch *v.* Union Inst. for Sav., 158 Mass. 394 170

M

McCann *v.* Randall, 147 Mass. 81 . . . . . 34, 36
McCarthy *v.* Wood Lumber Co., 219 Mass. 566 . . . . . 65, 66
McCurdy *v.* McCurdy, 197 Mass. 248 80
McCusker *v.* Goode, 185 Mass. 607 139
McGurk *v.* Cronenwett, 199 Mass. 457 191
McKay *v.* Coolidge, 218 Mass. 65 204
MacKeown *v.* Lacey, 200 Mass. 437 . . . . . 12, 13, 60
McMahon *v.* Brown, 219 Mass. 23 19
McMurtrie *v.* Guiler, 183 Mass. 451 45
McNamara *v.* Taft, 196 Mass. 597 . . . . . 175, 178
McSorley *v.* Larissa, 100 Mass. 270 46
Mactier *v.* Osborne, 146 Mass. 399 88
Macy *v.* Nantucket, 121 Mass. 351 . . . . . 22, 23
Maddison *v.* Alderson, L. R. 8 App. Cases 467 145
Manchester Ship Canal Co. *v.* Manchester Co., L. R. (1901) 2 Ch. 37 . 123
Manheim *v.* Woods, 213 Mass. 537 102
Mann *v.* Willey, 51 N. Y. App. Div. 169 178
Manning *v.* Mulrey, 192 Mass. 547 . . . . . 43, 50, 51
Mansfield *v.* Hodgdon, 147 Mass. 304 153
Mansfield *v.* Sherman, 81 Me. 365 . . . . . 117, 155
Mansfield *v.* Wiles, 221 Mass. 75 148
Mara *v.* Pierce, 9 Gray 306 63
Marble Co. *v.* Ripley, 10 Wallace 340 124
Marshall Engine Co. *v.* New Marshall Engine Co., 199 Mass. 546 203 Mass. 410 . 131, 132, 181, 186
Marshall *v.* Jaquith, 134 Mass. 138 15
Martell *v.* White, 185 Mass. 255 . . . . . 194, 197
Martin *v.* Barnes, 214 Mass. 29 14
Martin *v.* Drinan, 128 Mass. 515 135
Marvel *v.* Cobb, 200 Mass. 293 . . . . . 49, 50, 110, 112
Mason *v.* Mason, 140 Mass. 63 68
Mass. Inst. of Technology *v.* Boston Soc. Nat. History, 218 Mass. 189 . 136, 138, 140
Matthews *v.* Gadd, 5 So. Australia 129 82
Matthews *v.* Thompson, 186 Mass. 14 107
Maxham *v.* Day, 16 Gray 213 119
Mayer *v.* Gowland, 2 Dickens 563 82
Mayor *v.* Emmons, L. R. (1901) 1 K. B. D. 515 125
Mayor of N. Y. *v.* Brady, 115 N. Y. 599 161

Meagher *v.* Hoyle, 173 Mass. 577 157
Medford & C. R. Co. *v.* Somerville, 111 Mass. 232 124
Mellon *v.* Reed, 123 Penn. 1 77-79-80
Melrose *v.* Cutter, 159 Mass. 461 . . . . . 175, 177, 178
Mercantile Marine Ins. Co. *v.* Corcoran, 1 Gray 75 . . 43, 44, 49
Merchants' Legal Stamp Co. *v.* Murphy, 220 Mass. 281 . . 129
Merriam *v.* Boston, etc. Co.. 117 Mass. 241 41
Merrifield *v.* Lombard, 13 Allen 16 175
Merrill *v.* Beckwith, 163 Mass. 503; 168 Mass. 72 . 9, 34, 37, 81, 116
Messer *v.* The Fadettes, 168 Mass. 140 187
Metcalf *v.* Metcalf, 83 Me. 473 33
Metcalf *v.* Williams, 104 U. S. 93 111
Metropolitan Elec. Co. *v.* Gooder, L. R. (1901) 2 Ch. 799 . 129
Middlefield *v.* Church Mills Knitting Co., 160 Mass. 267 . 140
Middlesex Co. *v.* McCue, 149 Mass. 103 175
Miles *v.* Schmidt, 168 Mass. 339 . . . . . 122, 123
Milkman *v.* Ordway, 106 Mass. 232 31
Milldam Foundry *v.* Hovey, 21 Pick. 417 88
Miller *v.* Hyde, 161 Mass. 472 155
Milton *v.* Puffer, 207 Mass. 416 170
Minasian *v.* Osborne, 210 Mass. 250 196
Minot, petitioner, 164 Mass. 38 206
Mitchell *v.* Dowell, 105 U. S. 430 31
Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598 . . . 197
Mollineaux *v.* Powell, 3 P. Wms. 268 . . . . . 166, 168
Moneyweight Scale Co. *v.* McBride, 199 Mass. 503; 223 U. S. 749 163
Montacute *v.* Maxwell, 1 P. Wms. 618 144
Montague *v.* Flockton, L. R. 16 Eq. 189 127
Moore *v.* Rawson, 199 Mass. 493 . . . . . 133, 202
Moore *v.* Sanford, 151 Mass. 285 75
Moors *v.* Ladenburg, 178 Mass. 272 . . . . . 36, 160, 162
Moran *v.* Dunphy, 177 Mass. 485 194
Morris *v.* Colman, 18 Vesey 437 127
Morris *v.* Griffiths, 26 Ch. D. 601 77
Morse *v.* Aldrich, 19 Pick. 449 135
Morse *v.* Stearns, 131 Mass. 389 20
Moseley *v.* Bolster, 201 Mass. 135 29
Motherway *v.* Wall, 168 Mass. 333 99
M. Steinert & Sons Co. *v.* Tagen, 207 Mass. 394 . . . . 25, 200
Muller *v.* Dows, 94 U. S. 444 36
Mullet *v.* Halfpenny, Prec. in Ch. 404 147
Mundy *v.* Jolliffe, 5 Mylne & Craig 167 146
Munroe *v.* Weir, 177 Mass. 301 86
Munsey *v.* Butterfield, 133 Mass. 492 131
Murphy *v.* Christian, etc. Pub. Co., 38 N. Y. App. Div. 426 137
Murphy *v.* Murphy, 217 Mass. 233 . . . . . 18, 120
Murphy *v.* Robinson, 214 Mass. 585 111

N

Nash *v.* D'Arcy, 183 Mass. 30 8
Nash *v.* McCathern, 183 Mass. 345 205
Nash *v.* Minn. Title Ins. & Trust Co., 163 Mass. 574 . . . 109
Nathan *v.* Nathan, 166 Mass. 294 . . . . . 13, 28
Naton *v.* McCall, 86 Me. 350 36
National Cash Register Co. *v.* Navy Cash Register Co., 99 Fed. Rep. 565 . 182
National Granite Bank *v.* Tyndale, 176 Mass. 547 41
National Life Ins. Co. *v.* Pingrey, 141 Mass. 411 21
National Security Bank *v.* Batt, 215 Mass. 489 21
Nazro *v.* Long, 179 Mass. 451 8
Nelson *v.* Piper, 213 Mass. 531 . . . . . 23, 54, 57
Nelson *v.* Winchell, 203 Mass. 75 . . 47, 186, 187, 190, 191, 204
Neuberger *v.* Klein, 134 N. Y. 35 105
Newcomb *v.* Gibson, 127 Mass. 396 . . . . . 207, 208
Newcomb *v.* Norfolk St. Ry. Co., 179 Mass. 449 124
Newell *v.* Hadley, 206 Mass. 335 . . . . . 60, 202, 206, 210
New England Awl & Needle Co. *v.* Marlborough Awl & Needle Co., 168, Mass. 154 . 189
New England Cement Gun Co. *v.* McGivern, 218 Mass. 198 193,196
New England Mut. Life Ins. Co. *v.* Phillips, 141 Mass. 535 28, 29
New England Structural Co. *v.* Everett Distilling Co., 189 Mass. 145 . 70
New England Trust Co. *v.* Abbott, 162 Mass. 148 . . . 121, 123
New Salem *v.* Eagle Mill Co., 138 Mass. 8 179
Newton Centre Trust Co. *v.* Stuart, 201 Mass. 288 . . . 71, 73
New York Bank Note Co. *v.* Kidder Press Mfg. Co., 192 Mass. 391 .128
New York Life Ins. Co. *v.* Eggleston, 96 U. S. 572 . . . 76
New York, N. H. & H. R. R. *v.* Martin, 158 Mass. 313 . . 8
New York, N. H. & H. R. R. *v.* York & Whitney Co., 215 Mass. 36 . 68
Nickerson *v.* Bridges, 216 Mass. 416 . . . . . 117, 143, 154,156
Nickerson *v.* Mass. Title Ins. Co., 178 Mass. 308 . . . 72, 74
Nickerson *v.* Sweet, 135 Mass. 514 88
Niles *v.* Graham, 181 Mass. 41 . . . . . 88, 110
Noble *v.* J. Burnett Co., 208 Mass. 75 . . . . . 189, 204
Nolin *v.* Pearson, 191 Mass. 283 13
Norcross *v.* James, 140 Mass. 188 . . . . . 134, 135,139
Nordenfelt *v.* Maxim, Nordenfelt Guns & Ammunition Co., (1894) App. Cases 535 129
Norris *v.* Fox, 45 Fed. Rep. 406 152
North Ave. Sav. Bank *v.* Hayes, 188 Mass. 135 208
North Nat'l Bank *v.* Hamlin, 125 Mass. 506 209
Norton *v.* Piscataqua, etc. Ins. Co., 111 Mass. 532 53
Nottingham Patent Brick & Tile Co. *v.* Butler, L. R. 16 Q. B. D. 778 138
Noyes *v.* Johnson, 139 Mass. 436 151
Nugent *v.* Cloon, 117 Mass. 219 37

O

O'Brien *v.* Boland, 166 Mass. 481 . . . . . 153, 154
O'Brien *v.* Goodrich, 177 Mass. 32 172
O'Brien *v.* McNeil, 199 Mass. 164 203
Old Colony R. Corp. *v.* Evans, 6 Gray 25 . . . . . 27, 154
Old Colony Trust Co. *v.* Chauncey, 214 Mass. 271 . . 148, 152
Old Colony Trust Co. *v.* Medfield, etc. Ry., 215 Mass. 156 . 41
Old Corner Book Store *v.* Upham, 194 Mass. 101 . . 131, 132
Old Dominion Copper Co. *v.* Bigelow, 188 Mass. 315; 199 Mass. 488; 203 Mass. 159 65, 103, 111, 162
Old Dominion Copper Co. *v.* Lewisohn, 136 Fed. Rep. 915; 148 Fed. Rep. 1020; 210 U. S. 206 . 103
Oliver *v.* Gale, 182 Mass. 39 164
Order of the Golden Cross *v.* Merrick, 163 Mass. 374 . . . 21
O'Shea *v.* Vaughan, 201 Mass. 412 111
Otis *v.* Coffin, 7 Gray 511 96
Otis *v.* Freeman, 199 Mass. 160 47
Otis *v.* Prince, 10 Gray 581 101

P

Page *v.* Franklin, 214 Mass. 552 30
Page *v.* Higgins, 150 Mass. 27 95
Page *v.* Young, 106 Mass. 313 30
Paine *v.* Meller, 6 Vesey 349 84
Palmbaum *v.* Magulsky, 217 Mass. 306 109
Palmer *v.* Clark, 106 Mass. 373 122
Palmer *v.* Lavers, 218 Mass. 286 126
Palmer *v.* Stebbins, 3 Pick. 188 130
Parke *v.* Boston, 175 Mass. 463 91
Parker *v.* American Woolen Co., 195 Mass. 591 . . 175, 177, 179
Parker *v.* American Woolen Co., 215 Mass. 176 . . 49, 180, 181
Parker *v.* Garrison, 61 Ill. 250 120
Parker *v.* New England Trust Co., 215 Mass. 226 119
Parker *v.* Nickerson. 137 Mass. 487 33
Parker *v.* Nightingale, 6 Allen 341 61
Parker *v.* Simpson, 180 Mass. 334 . . . . . 4, 32, 33, 102
Parkin *v.* Thorold, 16 Beavan 59 148
Parkman *v.* Welch, 19 Pick. 231 105
Patterson *v.* Patterson, 197 Mass. 112 14
Patton *v.* Kimball, 70 Ill. 72 86
Pavesich *v.* New England Life Ins. Co., 122 Ga. 190 . . . 184
Payson *v.* Lamson, 134 Mass. 593 . . . . . 160, 161
Peabody *v.* Norfolk, 98 Mass. 452 . . . . . 126, 128, 189
Pearl *v.* Harris, 121 Mass. 390 122
Pearmain *v.* Mass. Hosp. Life Ins. Co., 206 Mass. 377 . . 210
Pearson *v.* Pearson, 27 Ch. D. 145 130
Peck *v.* Conway, 119 Mass. 546 . . . . . 138, 140
Peck *v.* Jenness, 7 How. 612 161
Peek *v.* Peek, 77 Cal. 106 . . . . . 45, 147

Pegge *v.* Skynner, 1 Cox Eq. 23 38
Pengall *v.* Ross, 2 Eq. Abr. 46 145
Penn *v.* Lord Baltimore, 1 Vesey Cases 444 35
Penniman *v.* Rodman, 13 Met. 382 123
Pennoyer *v.* Neff, 95 U. S. 714 . . . . . 37, 65
Perkins *v.* Coughlin, 148 Mass. 30 78
Perkins *v.* Perkins, 181 Mass. 401 146
Perry *v.* Hale, 143 Mass. 540 17
Peter *v.* Beverly, 10 Peters 532 78
Peters *v.* Bollestier, 3 Pick. 495 75
Peters *v.* Equitable Life Ass. Co., 196 Mass. 143 . . . . 203, 204
Peters *v.* Stone, 193 Mass. 179 . . . . . 135, 166
Phelps *v.* Sullivan, 140 Mass. 36 72
Phila. Ball Club *v.* Lajoie, 202 Penn. 210 127
Phillips *v.* Blatchford, 137 Mass. 510 19
Phillips *v.* Suffolk Sav. Bank, 219 Mass. 597 23
Pickett *v.* Walsh, 192 Mass. 572 . . . . . 191, 196, 197, 201
Pierce *v.* Chace, 108 Mass. 254 69
Pierce *v.* Eq. Life Ass. Co., 145 Mass. 56 . . . . . 25, 204
Pierce *v.* O'Brien, 189 Mass. 58 106
Pierce *v.* Woodward, 6 Pick. 206 130
Pike *v.* Waltham, 168 Mass. 581 56
Pingree *v.* Coffin, 12 Gray 288 . . . . . 34, 35, 148
Plant *v.* Woods, 176 Mass. 492 . . . . . 194, 199
Platt *v.* Squire, 12 Met. 494 68
Platt, *v.* Woodruff, 61 N. Y. 378 160
Plymouth *v.* Wareham, 126 Mass. 475 71
Poerther *v.* Russell, 33 Wisc. 193 166
Pogrotsky *v.* Levatinsky, 218 Mass. 116 100
Pollard *v.* Photographic Co., L. R. 40 Ch. D. 345 184
Polsey *v.* Newton, 199 Mass. 450 95
Pond *v.* Harris, 113 Mass. 114 122
Porter *v.* Stuart, 203 Mass. 46 111
Porter *v.* Wakefield, 146 Mass. 25 15
Potter *v.* Howe, 141 Mass. 357 179
Potter *v.* Jacobs, 111 Mass. 32 146
Potterton *v.* Condit. 218 Mass. 216 181
Powell Duffryn Coal Co. *v.* Taff Vale Ry. Co., L.R. 9 Ch. App. 331, 124
Powers *v.* Raymond, 137 Mass. 483 32
Preston *v.* Newton, 213 Mass. 483 . . . . . 27, 163, 171
Preston *v.* West's Beach Corp'n, 195 Mass. 482 172
Prewitt *v.* Wilson, 103 U. S. 22 107
Prince *v.* Crocker, 166 Mass. 347 164
Proprietors Charles River Bridge *v.* Proprietors Warren Bridge, 7 Pick. 344 . 33
Prospect Park, etc. Co. *v.* Cone Island, etc. Co., 144 N. Y. 152, 124
Provident Inst. *v.* White, 115 Mass. 112 22
Putnam *v.* Grace, 161 Mass. 237 152
Putnam *v.* Misochi, 189 Mass. 421 207
Putnam *v.* Story, 132 Mass. 205 44
Pynchon *v.* Stearns, 11 Met. 304 . . . . . 165 16

Q

Quinn *v.* Hayden, 219 Mass. 343 203

R

Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1 100
Ray *v.* Powers, 134 Mass. 22 207
Rayner *v.* Preston, L. R. 18 Ch. Div. 1 . . . . . 81, 84
Raynes *v.* Stevens, 219 Mass. 556 173
Reading Stone Works *v.* S. M. Howes Co., 201 Mass. 437 188, 204
Reardon *v.* Reardon, 219 Mass. 594 114
Record *v.* Littlefield, 218 Mass. 483 . . . . . 58, 156
Reed *v.* Boardman. 20 Pic, 441 205
Reed *v.* Paul, 131 Mass. 129 211
Reed *v.* Washington Ins. Co., 138 Mass. 572 122
Reed *v.* Whitney, 7 Gray 533 83
Rees *v.* Watertown, 19 Wall 121 40
Reggio *v.* Warren, 207 Mass. 525 90
Regis *v.* Jaynes, 191 Mass. 245 . . . . . 190, 191
Renals *v.* Cowlishaw, 9 Ch. D. 125 . . . . . 136, 138
Revere *v.* Revere Water Co., 218 Mass. 161 . . . . . 30, 113
Reynolds *v.* Davis, 198 Mass. 294 . . . . . 193, 196, 197, 199, 201
Rice *v.* Boston & Worcester R. R., 12 Allen 141 56
Rice *v.* D'Arville, 162 Mass. 559 126
Rice *v.* Hale, 5 Cush. 238 38
Rice *v.* Merrill, 215 Mass. 419 110
Rice *v.* Southgate, 16 Gray 142 206
Rice *v.* Stone, 1 Allen 566 55
Richard's Appeals, 57 Penn. 105 178
Richards *v.* Dower, 64 Cal. 62 169
Richards *v.* Keyes, 195 Mass. 184 71
Richards *v.* Todd, 127 Mass. 167 18
Richardson Shoe Mach. Co. *v.* Essex Mach. Co., 207 Mass. 219 . 55, 116
Richardson *v.* White, 167 Mass. 58 . . . . . 57, 58
Rideout *v.* Knox, 148 Mass. 368 180
Riverbank Improvement Co. *v.* Bancroft, 209 Mass. 217 . 139
Riverside Cotton Mills *v.* Alabama & G. Mfg. Co., 198 U. S. 188 . 162
Roberts *v.* Berry, 3 D., Mc.. & G., 284 150
Roberts *v.* Cambridge, 164 Mass. 176 119
Robertson *v.* Baldwin, 165 U. S. 275 126
Robinson *v.* Brown, 182 Mass. 266 177
Robinson *v.* Wiley, 188 Mass. 533 . . . . . 21, 55
Robinson *v.* Williams, 8 Met. 454 16
Rockport *v.* Elwell, 219 Mass. 287 177
Rogers *v.* Abbot, 206 Mass. 270 55
Rogers *v.* Boston Club, 205 Mass. 261 26
Rogers *v.* Challis, 27 Beavan 175 121
Rogers *v.* Dutton, 182 Mass. 187 74

Rogers *v.* Hosegood, L. R. (1900) 2 Ch. 388 138
Rogers *v.* Shea, 219 Mass. 416 67
Rohan *v.* Hanson, 11 Cush. 44 205
Rolikatis *v.* Lovett, 213 Mass. 545 . . . . . 102, 202
Ropes *v.* Upton, 125 Mass. 258 130
Rudnick *v.* Murphy, 213 Mass. 470 26
Runkle *v.* Burrage, 202 Mass. 89 113
Russell *v.* American Bell Tel. Co., 180 Mass. 467 74
Russell *v.* Webster, 213 Mass. 491 23
Rutherford *v.* Haven, 11 Iowa 587 149
Ryan *v.* Mutual Ass'n, (1893) 1 Ch. 116 124
Ryder *v.* Wilcox, 103 Mass. 24 17

S

Saco Brick Co. *v.* J. P. Eustis Mfg. Co., 207 Mass. 312 . . 8, 65
Sanborn *v.* Rice, 129 Mass. 387 142
Sanford *v.* Soule Piano & Organ Inv. Co., 164 Mass. 85 . . 75
Sarkisian *v.* Teele, 201 Mass. 596 . . . . . 143, 144
Savage *v.* Mason, 3 Cush. 500 136
Savannah Nat'l Bank *v.* Haskins, 101 Mass. 370 . . . . 86, 87
Sawyer *v.* Cook, 188 Mass. 163 50
Sawyer *v.* Davis, 136 Mass. 239 180
Sawyer *v.* Hovey, 3 Allen 331 95
Schmidt *v.* Schmidt, 216 Mass. 572 . . . . . 47, 108
Schwoerer *v.* Boylston Market, 99 Mass. 285 136
Scott *v.* Hanson, 1 Simons 13 155
Searle *v.* Sawyer, 127 Mass. 491 167
Seavey *v.* Drake, 62 N. H. 393 147
Shapira *v.* D'Arcy, 180 Mass. 377 32
Shapira *v.* Wildey Sav. Bank, 213 Mass. 498 . . . . . 93, 94
Sharon *v.* Sharon, 67 Cal. 185 11
Shaw *v.* Loud, 12 Mass. 447 212
Shelton *v.* Sears, 187 Mass. 455 42
Shepherd *v.* Shepherd, 196 Mass. 179 . . . . . 14, 104, 105
Sherry *v.* Perkins, 147 Mass. 212 . . . . . 174, 200
Short *v.* Caldwell, 155 Mass. 57 37
Short *v.* Currier, 153 Mass. 182 . . . . . 93, 98
Sibley *v.* Nason, 196 Mass. 125 55
Sikes *v.* Work, 6 Gray 433 16
Silloway *v.* Columbia Ins. Co., 8 Gray 199 105
Simmons Med. Co. *v.* Simmons, 81 Fed. Rep. 163 128
Simonds *v* Simonds, 112 Mass. 157 79
Skinner *v.* Houghton, 92 Md. 68 84
Skinner *v.* Tirrell, 159 Mass. 474 . . . . . 209, 210
Skrine *v.* Jackson, 73 Ga. 377 40
Slater *v.* Gunn, 170 Mass. 509 . . . . . 25, 171, 172
Slater *v.* Rawson, 6 Met. 439 135
Sleeper *v.* Nicholson, 201 Mass. 110 151
Small *v.* Cahoon, 207 Mass. 359 . . . . . 164, 166

Smith *v.* Burgess, 133 Mass. 511 64
Smith, etc. Co. *v.* Canady, 213 Mass. 122 . . . . . 149, 156
Smith *v.* Everett, 126 Mass. 304 . . . . . 18, 30
Smith *v.* Green, 197 Mass. 16 . . . . . 152, 153
Smith *v.* Hatch, 46 N. H. 146 145
Smith *v.* Kenney, 213 Mass. 6 101
Smith *v.* Price, 214 Mass. 298 143
Smith *v.* Smith, 148 Mass. 1 25
Smyth *v.* Sprague, 149 Mass. 310 72
Snell *v.* Atlantic F. & M. Ins. Co., 98 U. S. 85 . . . . . 94, 97
Snell *v.* Dwight, 120 Mass. 9 47
Snow *v.* Alley, 156 Mass. 193 75
Snow *v.* Blount, 182 Mass. 489 47
Snow *v.* Boston Blank Book Mfg. Co,. 153 Mass. 465 . . 49, 51
Snow *v.* Hutchins, 160 Mass. 111 . . . . . 69, 72
Snow *v.* Wheeler, 113 Mass. 179 195
Solomon *v.* Hertz, 40 N. J. Eq. 400 128
Somerly *v.* Buntin, 118 Mass. 279 27
Somes *v.* Skinner, 3 Pick. 52 68
Southbridge Sav. Bank *v.* Mason, 147 Mass. 500 167
Spelman *v.* Aldrich, 126 Mass. 113 15
Spooner *v.* Spooner, 155 Mass. 52 12
Sprague *v.* Kimball, 213 Mass. 380 45
Springfield *v.* Conn. River R.R. 4 Cush. 63 177
Spurr *v.* Benedict, 99 Mass. 463 . . . . . 91, 93
Spurr *v.* Scoville, 3 Cush. 578 34
Squire *v.* Learned, 196 Mass. 134 . . . . . 56, 117
Standard Elevator Co. *v.* Crane Elevator Co., 56 Fed. Rep. 718 . 182
Standard Paint Co. *v.* Trinidad Asphalt Mfg. Co., 220 U. S, 446 . 186
Staples *v.* Mullen, 196 Mass. 132 . . . . . 118, 149
Starkie *v.* Richmond, 155 Mass. 188 173
Stearns *v.* Swift, 8 Pick. 532 69
Stebbins *v.* Palmer, 1 Pick. 71 55
Stetson *v.* Day, 51 Maine 434 167
Stetson *v.* Moulton, 140 Mass. 597 209
Stevens *v.* Pierce, 151 Mass. 207 74
Stevens *v.* Rockport Granite Co., 216 Mass. 486 . 25, 159, 174, 176, 181
Stewart *v.* Finkelstone, 206 Mass. 28 . . . . . 47, 137, 141, 143
Stewart *v.* Joyce, 201 Mass. 301; 205 Mass. 371 . 50, 51, 98, 100, 111
Stiff *v.* Ashton, 155 Mass. 130 71
Stimson *v.* Whitney, 130 Mass. 591 70
Stockbridge *v.* Mixer, 215 Mass. 415 32
Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45 . 33, 42, 90
Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 315 . 97
Stockwell *v.* Shalit, 204 Mass. 270 . . . . . 105, 108
Stone *v.* Hackett, 12 Gray 227 58
Stone *v.* Reed 152 Mass. 179 21
Stone *v.* Sargent, 220 Mass. 445 111

Stowe *v.* U. S., 19 Wallace 13 69
Stratton Co. *v.* Stratton, 206 Mass. 117 103
Strickland *v.* Fitzgerald, 7 Cush. 530 119
Strout *v.* United Shoe Mach. Co., 215 Mass. 116 . . . . . 41, 50
Sturtevant *v.* Jaques, 14 Allen 523 151
Sunter *v.* Sunter, 190 Mass. 449; 198 Mass. 137 . . . . . 51, 204
Suter *v.* Matthews, 115 Mass. 253 28
Swaine *v.* Great Northern Ry. Co., 4 De Gex, Jones & Smith 211 . 178
Szathmary *v.* Boston & Albany R.R. Co., 214 Mass. 42 . 169, 170

T

Taft *v.* Henry, 219 Mass. 78 108
Tallmadge *v.* East River Bank, 26 N. Y. 105 142
Tarbell *v.* Bowman, 103 Mass. 341 . . . . . 92, 96
Taunton *v.* Taylor, 116 Mass. 254 177
Taylor V. Butterick, 165 Mass. 547 89
Taylor *v.* Lynch, 5 Gray 49 56
Taylor *v.* Page, 6 Allen 86 60
Thaxter *v.* Sprague, 159 Mass. 397 149
Thayer *v.* Daniels, 110 Mass. 345; 113 Mass. 129 . . . 44, 60, 212
Third Nat'l Bank *v.* Skillings, 132 Mass. 410 22
Thissell *v.* Schillinger, 186 Mass. 180 77
Thomas *v.* Howell, 34 Ch. Div. 166 81
Thompson *v.* Barry, 184 Mass. 429 . . . . . 99, 100
Thompson *v.* Gould, 20 Pick. 134 84
Thompson *v.* Heywood, 129 Mass. 401 167
Thorpe *v.* Brumfitt, L. R. 8 Ch. App. 650 174
Thurston *v.* Hamblin, 199 Mass. 151 204
Tilley *v.* Thomas, L. R. 3 Ch. App. 61 150
Tillotson *v.* Rose, 11 Met. 299 206
Title Guarantee and Trust Co. *v.* Haven, 196 N. Y. 487 . 210
Tobin *v.* Larkin, 183 Mass. 389 . . . . . 148, 149, 156
Toledo, etc. Railroad Co. *v.* Penn. Co., 54 Fed. 746 40
Tomlinson *v.* Bury, 145 Mass. 346 . . . . . 207, 208
Tompkins *v.* Halleck, 133 Mass. 32 184
Topliff *v.* Jackson, 12 Gray 565 18
Tower *v.* Appleton Bank, 3 Allen 387 87
Townley *v.* Bidwell, 14 Vesey 591 82
Townsley *v.* Chaplin, 12 Allen 476 40
Tracy *v.* Lincoln, 145 Mass. 357 72
Traiser *v.* Doty Cigar Co., 198 Mass. 327 186
Trask *v.* Sturges, 170 N. Y. 482 79
Traveler Shoe Co. *v.* Koch, 216 Mass. 412 . . . . . 146, 147
Trecy *v.* Jefts, 149 Mass. 211 110
Trego *v.* Hunt, (1896) App. C. 7 . . . . . 130, 132
Tucker *v.* Howard, 128 Mass. 361 . . . . . 169, 170, 172
Taft *v.* Henry, 219 Mass. 78 108
Tufts *v.* Charlestown, 2 Gray 271 134
Tulk *v.* Moxhay, 11 Beavan 571 . . . . . 61, 136

Turner *v.* Revere Water Co., 171 Mass. 329 125
Turnquist *v.* Harmon, 219 Mass. 560 75
Tuttle *v.* Batchelder & Lincoln Co., 170 Mass. 315 109
Tuttle *v.* Standish, 4 Allen 481 87
Tyler *v.* Court of Registration, 175 Mass. 71 . . . . . 34, 37
Tyler *v.* Odd Fellows, etc., 145 Mass. 134 71

U

Ungley *v.* Ungley, L. R. 5 Ch. D. 887 147
Union Bank *v.* Pool, 143 Mass. 203 21
Union Trust Co. *v.* Olmstead, 102 N. Y. 729 36
United Shoe Mach'y Co. *v.* Kimball, 193 Mass. 351 . 126, 130
United Shoe Mach'y Co. *v.* La Chapelle, 212 Mass. 467 . 129
United States *v.* Insley, 130 U. S. 263 51
United States *v.* Parkhurst-Davis Mercantile Co., 176 U. S. 317 162
United Zinc Cos. *v.* Harwood, 216 Mass. 474 . . . 56, 103, 112
Utermehle *v.* Norment, 197 U. S. 40 89

V

Vann *v.* Burr, 151 Mass. 386 66
Van Ness *v.* Boiney, 214 Mass. 340 69
Varney *v.* Baker, 194 Mass. 239 163
Vass *v.* Wales, 129 Mass. 38 122
Vaughan *v.* Bridgham, 193 Mass. 392 174
Vegelahn *v.* Guntner, 167 Mass. 92 . . 191, 195, 199, 200, 201
Vernon *v.* Stephens, 2 P. Wms. 66 150
Von Arnim *v.* American Tube Works, 188 Mass. 515 . . 50, 163, 164, 203
Vonderbank *v.* Schmidt, 44 La. Ann. 264 130

W

Wadsworth *v.* Williams, 100 Mass. 126 106
Wakeham *v.* Barker, 82 Cal. 46 126
Walker *v.* Brooks, 125 Mass. 241 54
Walker *v.* Cronin, 107 Mass. 555 . . . . . 193, 194, 195, 19
Walsh *v.* Walsh, 116 Mass. 377 37
Walworth *v.* Cassassa, 219 Mass. 20 163
Warner *v.* Morrison, 3 Allen 566 212
Warren *v.* Pazolt, 203 Mass. 328 101
Warren *v.* Warren Thread Co., 134 Mass. 247 . . . . . 185, 187
Washburn *v.* Miller, 117 Mass. 376 171
Washburn *v.* White, 197 Mass. 540 45
Wasserman *v.* McDonnell, 190 Mass. 326 58
Watson *v.* Sutherland, 5 Wallace 74 173
Watson *v.* Watson, 128 Mass. 152 68
Webber *v.* Landrigan, 215 Mass. 221 137
Webber Lumber Co. *v.* Shaw, 189 Mass. 366 211

Webster *v.* Webster, 180 Mass. 310 133
Weeks *v.* Parsons, 176 Mass. 570 207
Weener *v.* Brayton, 152 Mass. 101 . . . . . 185, 186
Welch *v.* Boston, 208 Mass. 326 22
Weller *v.* Smeaton, 1 Brown Ch. 572 175
Wells *v.* Calnan 107 Mass. 514 84
Wentworth *v.* Manhattan, 216 Mass. 374 117
Wenz *v.* Pastene, 209 Mass. 359 . . . . . 43, 45, 64
West *v.* Camden, 135 U. S. 507 101
Westall *v.* Wood, 212 Mass. 540 . . . . . 45, 121
West Ham Board *v.* E. London Co., (1900) 1 Ch. 624 . . . 167
Westlake *v.* Dunn, 184 Mass. 260 . . . . . 71, 99
West Publishing Co. *v.* Lawyers' Co-op. Pub. Co., 53 Fed. Rep. 265 183
W. Galligan Co. *v.* Casey, 205 Mass. 26 61
Wheeler *v.* Sage, 1 Wallace 518 47
Wheelock *v.* Noonan, 108 N. Y. 179 169
Whitcomb *v.* Converse, 119 Mass. 38 19
White *v.* Coleman, 127 Mass. 34 59
White *v.* Kenney, 157 Mass. 12 180
White *v.* Middlesex R. R., 135 Mass. 216 122
White *v.* Patten, 24 Pick. 324 69
White *v.* White, 169 Mass. 52 18
Whitfield *v.* Benit, 2 P. Wms. 240 166
Whiting *v.* Burkhardt, 178 Mass. 535 29
Whitman *v.* McIntyre, 199 Mass. 436 203
Whitman *v.* Porter, 107 Mass. 522 . . . . . 19, 207
Whitney *v.* Metallic Wire Screen Mfg. Co., 187 Mass. 557 . 45
Whitney *v.* Stearns, 11 Met. 319 38
Whitney *v.* Union Ry. Co., 11 Gray 359 136
Whitney *v.* Wheeler, 116 Mass. 490 15
Whittenton Mfg. Co. *v.* Staples, 164 Mass. 319 140
Whitwood Chemical Co. *v.* Hardman, L. R. (1891) 2 Ch. 416 127
Wiggins *v.* Brand, 202 Mass. 141 18
Wilkinson *v.* Stitt, 175 Mass. 581 31
Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110 . 191, 195, 199
Williams *v.* Carty, 205 Mass. 398 . . . . . 42, 97, 145, 146
Williams *v.* Farrand, 88 Mich. 473 130
Williams *v.* Hershaw, 11 Pick. 79 16
Wills *v.* Stradling, 3 Vesey, 378 146
Wilson *v.* Bryant, 134 Mass. 291 13
Wilson *v.* Jackson, 204 Mass. 432 . . . . . 47, 112
Wilson *v.* Martin-Wilson, etc. Co., 149 Mass. 24; 151 Mass. 515 . 26, 34
Wing *v.* Deans, 214 Mass. 546 69
Winslow *v.* Nayson, 113 Mass. 411 30
Winston *v.* Westfeldt, 22 Ala. 760 162
Witters *v.* Globe Sav. Bank, 171 Mass. 425 35
Wolfboro Loan & Banking Co. *v.* Rollins, 195 Mass. 323 . 53
Wolmershausen *v.* Gullick, L. R. (1893) 2 Ch. 514 207
Wood *v.* Boynton, 64 Wisc. 265 92

Wood *v.* Humphrey, 114 Mass. 185 122
Woodard *v.* Woodard, 216 Mass. 1 44
Woodward *v.* Spurr, 141 Mass. 283 12
Woodward *v.* Worcester, 121 Mass. 245 176
Wooldridge *v.* Norris, L. R. 6 Eq. 410 206
Worthington *v.* Waring, 157 Mass. 421 . . . . . 159, 193, 198

Y

York *v.* Flaherty, 210 Mass. 35 104
Young *v.* Haviland 215 Mass. 120 164

CITATIONS

AMES=Ames's Cases on Equity, Parts I-VI.

POMEROY=Pomeroy's Equity Jurisprudence.

Massachusetts cases are cited through Volume 220.

NOTE—The explanatory note after a given case cited, is not intended to be a summary of the case, or necessarily to state the facts found therein. It is intended that such a note shall call attention to something referred to in the case, either directly or indirectly, that makes the case in point as a citation.

CHAPTER I.

ORIGIN AND NATURE OF EQUITY

A. HISTORICAL.

B. EFFECT OF EQUITY GROWTH ON COMMON LAW.

C. AN OUTLINE OF EQUITY.

A. HISTORICAL

In the reign of William the Conqueror (1066-1087) the principal law courts in England[1] were:

1. The King's Court (*Curia Regis*)

2. Those of itinerant justices appointed by the crown to hear pleas in shire towns.

3. The local folk and manor courts.

The last two of these were by the time of Edward II (1307-1326) largely superseded by the courts of "justices in eyre" (ēr) appointed from the three more important English superior courts, to wit:

1. *The King's Court* (which after Henry II's time (1159-1184) had only judicial functions.)

2. *The Court of Common Bench* (or Common Pleas) at Westminister. Magna Charta had provided that "common pleas shall no longer follow the King," and, thereafter, controversies about land and other matters purely civil were heard at Westminister, for the transitory nature of the King's Court had proven a hardship.

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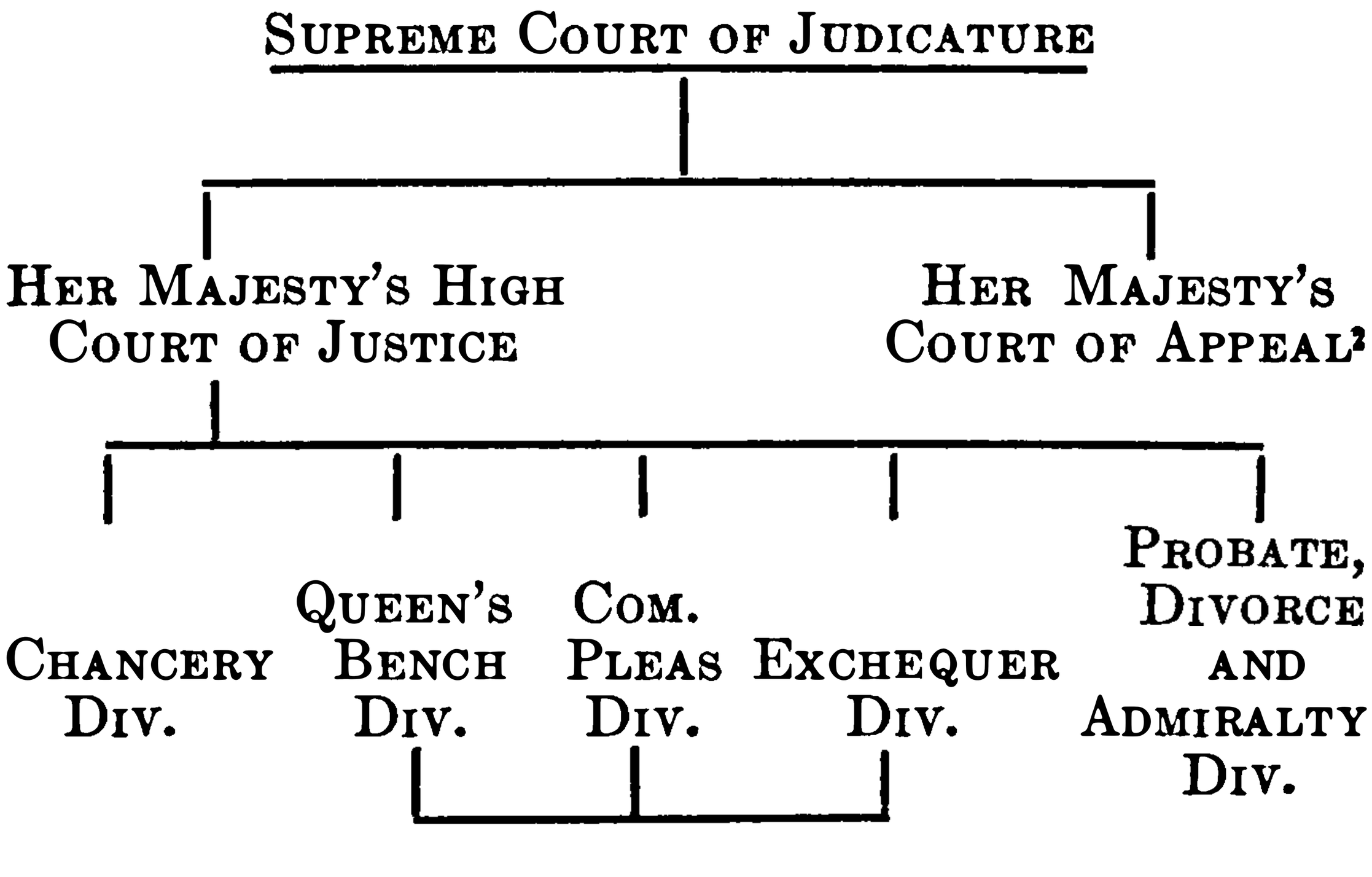
[1] See Pomeroy, Sections I and II.

3. *The Court of Exchequer* — originally concerned only with revenue matters.

In addition to the Common Law courts there was the great equity tribunal, the Chancery Court, headed by the Chancellor. There had been a Chancellor before and after the Conqueror, but originally he had little judicial power; he was merely the King's chief adviser.

The foregoing superior courts remained in some form until the Judicature Act of 1873 (effective November 1, 1875) when they and the Court of Chancery were all consolidated into the "Supreme Court of Judicature."

The organization provided for this court was:


SUPREME COURT OF JUDICATURE
HER MAJESTY'S HIGH COURT OF JUSTICE
HER MAJESTY'S COURT OF APPEAL[2]
CHANCERY DIV.
QUEEN'S BENCH DIV.
COM. PLEAS DIV.
EXCHEQUER DIV.
PROBATE, DIVORCE AND ADMIRALTY DIV.
CONSOLIDATED IN 1880 INTO QUEEN'S BENCH DIVISION.[3]

[2] From the Court of Appeal, an appeal lies in some matters to the House of Lords.

[3] For the present organization of the English courts, see "A History of English Legal Institutions" by A. T. Carter. Butterworth & Company, London, publishers.

The present Chancery Division deals primarily with cases involving equitable subject matter, although law and equity are administered concurrently in every court. Thus, injunctions and the remedy of specific performance are now granted in any of the divisions of the King's (formerly Queen's) Bench.

The great reason for the growth of the equity system was the inelasticity of common law procedure, and the inadequacy of common law remedies.

The actions at early common law, (that is, prior to 1285) were:

1. Real Actions (very restricted)
2. Personal Actions
   - *Ex contractu*
     - Debt
     - Covenant
   - *Ex delicto*
     - Trespass
     - Detinue
3. Replevin (very restricted)

Precedents for all writs were originally kept in the "Registra Brevium," an office connected with the Chancery. An applicant for a writ applied to the Chancellor's Clerk, who searched the precedents, and if he found none, no action could be begun.

By 13 Edward I (1285) "a case falling under like law (*i. e.*, like the foregoing in which writs might be issued) and requiring like remedy' might have a writ from Chancery. This statute[4] (13 Edward I, chap. 1, sec. 24) resulted in the actions of *Trespass on the Case*, *Trover* and *Assumpsit*, the most flexible of modern common law actions.

Even then the remedies of the Common Law were very limited. One desiring a remedy not in the foregoing groups was obliged to appeal directly to the Crown. At first such petitions were heard by the King and the Select Council, but by reign of Edward I

[4] Sometimes called the Statute of Westminister. Had this statute been more liberally construed there would perhaps have been less demand for equity jurisdiction, as we have it today. See Kerr on Equity Jurisprudence 11 and 12.

(1272-1307) it had become a custom to refer such matters to the Chancellor, a member of the Council who from early times had certain judicial powers.

Such was the origin of the Court of Chancery (and the law of equity.) Equity jurisdiction by the Chancellor was permanently and definitely established by Edward III in the twenty-second year of his reign (1348) in a decree authorizing jurisdiction in all cases requiring the exercise of the King's prerogative of grace. The Chancellor's authority was therefore general and not dependent on a writ, as at common law. This distinction never existed in America, where both courts derive jurisdiction from constitutions or statutes.

Present Procedure.

Reformed Procedure. To-day England and most American states (beginning with New York in 1848) make practically no distinction between procedure in legal and equitable causes or between tribunals administering law and equity.[5]

In *another class* of states, and the Federal Courts, there is still maintained different procedure, but the administration of both systems is in the same judges, who in one term hear law cases and in another equity, as in New England States and in many Southern States.

In a *third class* of states, there are provided separate judges for law and equity (in the latter case "Chancellors"), as in Alabama, Delaware, New Jersey, Tennessee and Mississippi.

Massachusetts Equity Jurisdiction — History

Stated in Parker **v.** Simpson, 180 Mass. 334.

See also Pomeroy, sections 311-321.

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[5] See reference to English Courts, *ante* page 3.

At the time of the adoption of the Massachusetts Constitution (1780), Massachusetts courts had no equity powers, except to grant relief in case of mortgages and to chancer bonds.

Holbrook *v.* Bliss, 9 Allen 69.

Massachusetts equity jurisdiction came largely through these Statutes:[6]

In the Supreme Court:

St. 1817, ch. 87,	over trusts under deeds and wills and to enforce specific performance.
St. 1823, ch. 140,	over disputes between partners joint tenants and tenants in common.
St. 1827, ch. 88,	to give relief against waste and nuisance.
Rev. Sts. (1836) ch. 81, sec. 8,	over all trusts.
Rev. St. (1836,) ch. 118, sec. 43,	over accounting (abolishing common law accounting.)
St. 1855, ch. 194,	over cases of fraud.
St. 1856, ch. 38,	over cases of mistake and accident.
St. 1857, ch. 214,	full equity jurisdiction, where no plain, adequate and complete remedy at law.
St. 1877, ch. 178,	(now Revised Laws, ch. 159, sec. 1) full jurisdiction over cases "cognizable under general principles of equity jurisprudence."

[6] This table is given here because it is believed it may be useful for reference, so that one may know whether any case he reads in the Massachusetts reports is a precedent today or whether its effect is lost by the limited jurisdiction of equity at the time the decision was made. In considering the value of cases in Massachusetts as precedents, it should be remembered that the foregoing statutes were strictly construed and that before St. 1877, ch. 178, the jurisdiction was limited to cases where there was no adequate remedy at law.

In the Superior Court:

St. 1883, ch. 223, gave full equity jurisdiction concurrent with Supreme Court (except in certain statutory equitable remedies going beyond general equity jurisdiction. See Revised Laws, ch. 159, sec. 2, and Baldwin *v.* Wilbraham, 140 Mass. 459.)

In the Probate Court:

Revised Laws, ch. 162, sec. 5, in administration of estates and trusts.

Revised Laws, ch. 148, sec. 1, in specific performance.

St. 1915, ch. 151, for the recovery of legacies.

To-day the Massachusetts courts have the broadest equity powers.

B. Effect of Equity Growth on Common Law.

As a branch of the law, equity to-day is a system of fixed principles. The extent of equity jurisdiction to-day is not determined by the injustice of legal rules or the inadequacy of legal remedies, but by whether or not the facts of any case are included under any of the settled principles constituting the present system of equity jurisprudence.[7]

The principles upon which equity jurisprudence is based, however, are equitable. The effect of their growth is seen in common law development in Massachusetts, for example, in

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[7] It is important to remember that these principles are as fixed as those of common law. Laymen generally, and courts and lawyers frequently, use the word "equitable" in a broad sense referring to the nature of conduct. But as a system of jurisprudence "equity" is not synonymous with "aequitas." Man-made law, intended to be of general application, must frequently fail to afford relief against particular unusual cases that involve hardship. A man may make an "inequitable" distribution of his property by will; but he has a right to, and equity does not concern itself with his act. It must not be inferred, however, that equity jurisdiction has ceased to develop. There are various equitable doctrines still in a constructive stage, as, for example, the doctrine of unfair competition.

I. *Legal Rules*

(*a*) Permitting suits on lost instruments.
Fales *v.* Russell, 16 Pick. 315.

(*b*) Relieving against forfeitures and penalties in bonds.
Holbrook *v.* Bliss, 9 Allen 69.

(c) Changing the effect of a seal. (Formerly payment of a sealed instrument could not be pleaded unless instrument had been returned or a release under seal given)
Pomeroy sec. 70.

(*d*) Allowing payment, without forfeiture, of overdue mortgages.
Holbrook *v.* Bliss, *supra.*

II. *Statutes*[8] *concerning*

(*a*) Trusts;
See Mass. Rev. Laws, ch. 147.

(*b*) Recording and priorities;
See Mass. Rev. Laws, ch. 127, sec. 1-6.

(*c*) Administration of estates and guardianships;
See Mass. Rev. Laws, ch. 137-145.
Mass. St. 1913, ch. 307.

(*d*) Married Women's property;
See Mass. Rev. Laws, ch. 153.

(*e*) Admission of Equitable Defenses;
See Mass. Rev. Laws, ch. 173, sec. 28 and 32.

(*f*) And many others.

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[8] In England, the Judicature Act provides that wherever there in any conflict or variance between the rules of equity and those of the common law with reference to the same matter, the rules of equity shall prevail.

III. *Equitable Defenses.*

Formerly, when the plaintiff was entitled to recover in an action at law and the defendant had some equitable right in the subject matter, the defendant was obliged to have the plaintiff enjoined in equity from prosecuting his suit at law. It is now provided by statute in many jurisdictions that the defendant may allege as a defense to an action at law any facts which would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action or against a judgment recovered by the plaintiff in such action.

Mass. Rev. Laws, ch. 173, sec. 28.

Nazro *v.* Long, 179 Mass. 451 (writ of entry; tenant set up that he was an equitable assignee of an agreement to purchase the property).

Ferguson *v.* Jackson, 180 Mass. 557 (former statute was not applicable to district or police courts)[9].

Such a defense may not be made if the defendant's claim has already been adjudicated adversely in equity.

Saco Brick Co. *v.* J. P. Eustis Mfg. Co., 207 Mass. 312.

A party having an equitable defense may still resort to an injunction restraining the other party from suing at law, but one who sets up an equitable defense and fails may not then seek an injunction against a suit at law.

N. Y., N. H. & H. R. R. *v.* Martin, 158 Mass. 313.

Nash *v.* D'Arcy, 183 Mass. 30

Gargano *v.* Pope, 184 Mass. 571.

J. P. Eustis Mfg. Co. *v.* Saco Brick Co., 198 Mass. 212.

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[9] But see Mass. St. 1913, ch. 307, extending this right.

The statute further provides that the *plaintiff*, in reply to a defense alleged by the defendant, may set up any facts which would "entitle the plaintiff to be absolutely and unconditionally relieved in equity against such defence."[10]

Revised Laws, ch. 173, sec. 32.

In Massachusetts, an action may, in the discretion of the court, be changed, by amendment, from law to equity and *vice versa*, at any time before final decree.

Revised Laws, ch. 159, sec. 6; ch. 173, sec. 52, as amended by Mass. St. 1911, Chap. 275.

Merrill *v.* Beckwith, 168 Mass. 72. (Bill had been ordered dismissed, but no decree.)

C. An Outline of Equity

A practical, though not wholly accurate test of what is comprised in Equity Jurisprudence is found in these three general divisions (suggested in Merwin's Equity, Chapter II):

I. Equitable Subject Matter;

II. Equitable Remedies;

III. Equitable Parties.

Equitable Subject Matter

At common law, in a suit concerning property, the plaintiff, in order to recover, must show that he has some legal title[11] to the land, contract, note or chattel in question.

But there may be in property an interest in another

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[10] So, if a defendant railroad plead release under seal of all claims, in defence of suit for negligence, plaintiff might then reply, alleging that release was obtained by fraud.

[11] "Legal title" simply means such a title as the common law courts recognized.

than the holder of the legal title (e. g. the title of a beneficiary under a trust in a will) which interest, although it has no recognition at common law, may be very real. This interest is the equitable right or title, originally recognized exclusively in courts of equity jurisdiction.

Further consideration of this subject belongs for the most part under "Trusts," and is therefore not given in this volume.

Equitable Remedies.

The remedies of the common law courts (except in the case of such special remedies as *mandamus*, *quo warranto*, etc.) are confined to awarding pecuniary damages, and to the recovery of specific real estate (by a real action) or of personal property (by replevin.[12])

There is no way, for instance, by a suit at common law, to prevent injury to property, to compel performance of a contract duty or to rectify a written instrument which clearly does not express the intent of the parties to it.

The wide scope of the remedies afforded by the equity courts is seen in this classification (see Pomeroy, sec. 112):[13]

(*a*) *Declarative* remedies, (declaring or confirming some right, title or property of plaintiff[14]);

(*b*) *Restorative* remedies, (restoring enjoyment of some right, title or property, as by mandatory injunction);

(c) *Preventive* remedies, (enjoining threatened injuries);

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[12] And at common law, and in some jurisdictions today, by detinue.

[13] For a shorter classification see Merwin, sec. 36–42.

[14] But the right declared must be one to be affected by the particular relief sought in the bill. Hanson *v.* Griswold, 221 Mass.

(*d*) Remedies of *Specific Performance*, (compelling one to do an act which he has contracted to do);

(*e*) Remedies of *Reformation*, *Correction* or *Re-execution* (of instruments);

(*f*) Remedies of *Recission* (of transactions) or *Cancellation* (of instruments);

(*g*) Remedies of *Pecuniary Compensation*,

(1) By recovery of judgment;

(2) By ordering payment of money from particular fund (as in foreclosure of mortgages);

(3) By distributing money among claimants (as in receivership of partnership);

(*h*) Remedy of *Accounting*;

(*i*) Remedies of *Conferring* or *Removing Official Functions*, (as of trustees);

(*j*) Remedies of *Establishing* or *Destroying Personal Status*, (as by divorce. Remedies largely statutory. See Sharon *v.* Sharon, 67 Cal. 185.)

The foregoing remedies are frequently concurrent.[15]

Cases are brought in equity, and not at common law, when one seeks these particular remedies which only the equity court can confer; and this is true whether the primary right to be enforced is equitable or legal.[16]

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[15] The several more important remedies are separately considered in subsequent chapters.

[16] For example, trespass upon a legal estate in land may be the basis of a suit at law for damages. But if one seeks the *equitable remedy* of injunction to protect from threatened continued trespass on that *legal* estate, he must seek it solely in a court of equity.

CHAPTER II.

EQUITABLE PARTIES.

A. Suits Between Husband and Wife.

B. Suits Between Partners.

C. Certain Suits Between Parties Having or Claiming Interests in a Common Subject Matter.

Suits between certain parties are not entertained at Common Law, but exclusively in Equity. There are three principal classes of equitable parties.

A. Suits between husband and wife.

At common law, husband and wife might not sue each other, nor might a married woman hold the legal title to property or sue anyone. In some states husband and wife may to-day sue each other at law, under statutes. In Massachusetts, such suits are still forbidden at law, and, except as hereinafter set forth, may not be brought in equity; though a married woman may contract with and sue persons other than her husband and may hold property as if sole.[1]

[1] A promissory note from husband to wife, or *vice versa*, is void and is not made valid by a transfer to a third person. Woodward *v.* Spurr, 141 Mass. 283; Kneil *v.* Egleston, 140 Mass. 202. But when a husband borrows money from his wife and gives a promissory note to a third person, who then transfers to the wife, (or where the maker marries the payee) the note is good and may be transferred to a third person for collection at law, or upon death of husband may be paid from his estate to her. This depends upon the original validity of the contract.

Spooner *v.* Spooner, 155 Mass. 52.
Crosby *v.* Clem, 209 Mass. 193 (a mortgage).
MacKeown *vs.* Lacey, 200 Mass. 437 (maker married payee)

Mass. Rev. Laws, ch. 153, secs. 1-9.

Caldwell *v.* Nash, 190 Mass. 507.

Wilson *v.* Bryant, 134 Mass. 291 (wife cannot sue husband on note payable to third person).

Fowle *v.* Torrey, 135 Mass. 87 (wife cannot sue husband's partnership).

Nolin *v.* Pearson, 191 Mass. 283. (not an equity case, but a general discussion by Braley, J.)

Atkins *v.* Atkins, 195 Mass. 124 (and cases cited)

MacKeown *v.* Lacey, 200 Mass. 437.

Suits permitted in equity between husband and wife are:

1. *To set aside ante-nuptial contracts* procured by fraud (Nathan *v.* Nathan, 166 Mass. 294); to compel carrying out of ante-nuptial or post-nuptial contracts in marriage settlements, or to protect rights under such settlements; (see *dictum* in Frankel *v.* Frankel, 173 Mass. 214).

2. *To protect a wife's equitable interest* from encroachment by her husband (and probably *vice versa*).

   Ayer *v.* Ayer, 16 Pick. 327 (suit by wife, beneficiary under a trust, against the trustee and her husband, who was wrongfully receiving income from trustee).

   Atlantic Bank *v.* Tavener, 130 Mass. 407 (*Quaere* as to whether loan to him may create equity in her favor).

   Holmes *v.* Winchester, 133 Mass. 140 (see *dictum*).

3. *To recover property obtained* from the one by

the other by *fraud or coercion*; or detained against the owner's will.

Atkins *v.* Atkins, 195 Mass. 124 (reconveyance ordered of land conveyed by trustee to wife through a conduit, for which she failed to pay as agreed).

Frankel *v.* Frankel, 173 Mass. 214 (wife against husband for money fraudulently obtained from her. Decree for *repayment*).

Lombard *v.* Morse, 155 Mass. 136 (husband against wife for property obtained from him, an insane person, the day before marriage).

Martin *v.* Barnes, 214 Mass. 29 (mortgages and notes).

Patterson *v.* Patterson, 197 Mass. 112 (furniture).

Shepherd *v.* Shepherd, 196 Mass. 179 (discussion of when wife is creditor of husband).

A husband or wife may not recover at law or in equity of the other, or of a partnership of which the other is a member, or of the other's estate, for money loaned (Clark *v.* Patterson, 158 Mass. 388. But as to other personal property see Patterson *v.* Patterson, *supra*). But see (in Holmes *v.* Winchester, 133 Mass. 140) an important *dictum* to the effect that a promise of a husband to give his wife certain stock, for a valuable consideration which had passed, could be specifically enforced.

4. *To follow and recover property entrusted by one*

to the care of the other and fraudulently invested by the other as his (or her) own;[2]

Bresnihan *v.* Sheehan, 125 Mass. 11 (husband's wages, entrusted to wife, invested by her)

Kershaw *v.* Merritt, 194 Mass. 113 (equitable replevin by wife to recover property pledged by her husband)

But a wife has no claim against her husband if she entrusts money to him without evidence as to the terms on which it was entrusted.

Jacobs *v.* Hesler, 113 Mass. 157.

5. *To obtain her equity to a settlement* from her own property where a husband came (before present statutes) into equity to reduce her

[2] In Massachusetts a man may not (except of articles enumerated in Revised Laws, ch. 153, sec. 3, and except of gifts *causa mortis*, which see *infra*) make a valid gift or transfer of personal property directly to his wife. (But see Porter *v.* Wakefield, 146 Mass. 25.) An attempted gift is still his property and may be attached as such by his creditors or demanded by him of third persons to whom she may have entrusted it (Brown *v.* Brown, 174 Mass. 197); but such an attempted gift may be so far valid as to give the wife, if she has had separate custody of the property during life, a right to the property at the death of her husband, as against his heirs or executors, but not as against his creditors. (Marshall *v.* Jaquith, 134 Mass. 138.)

A husband may make a gift to his wife (valid, except as to his creditors) through a third person; and a transfer in this manner is not voluntary and is good as against his creditors if in payment of money loaned him by her or as compensation for her release of dower. (Brown *v.* Brown, *supra*; Atlantic Bank *v.* Tavener, 130 Mass. 407; Holmes *v.* Winchester, 133 Mass. 140.)

He may even make her his agent to take money to a bank to be deposited and then drawn by her as her own. (Brown *v.* Brown, *supra*. But *cf.* Spelman *v.* Aldrich, 126 Mass. 113.)

A husband may make a gift *causa mortis* directly to his wife (Whitney *v.* Wheeler, 116 Mass. 490) in Massachusetts and by statute may now convey land directly to her. Mass. St. 1912, ch. 304,

personal property to possession. Equity compelled provision for a wife (even if bankrupt husband's assignee came in), though at common law he had legal title to the property.

Davis *v.* Newton, 6 Met. 537.

B. Suits between Partners.

At common law one partner may not sue the other[3] on a partnership matter, except as hereinafter set forth.

Capen *v.* Barrows, 1 Gray 376 (breach of a covenant in partnership agreement).

Suits at Law.

But if all debts are paid and accounts closed, leaving an ascertained balance due one partner from the other, the one partner may sue the other in an action at law for it.

Robinson *v.* Williams, 8 Met. 454.

Sikes *v.* Work, 6 Gray 433 (and in Mass. even though the amount due has not been ascertained).

Nor is it necessary in Massachusetts that all accounts due the firm shall have been collected, if a tender is made to assign to the other partner the outstanding accounts.

Williams *v.* Hershaw, 11 Pick. 79.

And, too, a partner may sue another in an action at law on a contract with him, binding personally, though relating to the firm affairs.

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[3] Nor may one partnership sue another where one person is a member of both firms. Cole *v.* Reynolds, 18 N. Y. 74.

Chamberlain *v.* Walker, 10 Allen 429.

Ryder *v.* Wilcox, 103 Mass. 24 (*dictum* at page 29. Personal note for money borrowed to pay obligation to firm).

Or he may sue in tort for fraudulently inducing him to enter the partnership.

Perry v. Hale, 143 Mass. 540.

Suits in Equity.

All suits between partners involving the partnership must be in equity.

The more important are for:

1. *Establishment of Partnership.*

A partnership may exist where the parties have given no consideration to the nature of their business relation. Equity may declare the partnership.

Emerson *v.* Atkinson, 159 Mass. 356.

2. *Regulation of Partnership.*

Equity will restrain one partner, upon the suit of another, from violating the partnership agreement, from misapplying the firm property, or from fraudulently acquiring an advantage with relation to a firm lease or agency.

Holmes *v.* Darling, 213 Mass. 203.

Lurie *v.* Pinanski, 215 Mass. 229.

3. *Dissolution of Partnership.*

A partnership may be dissolved in equity where there is a definite term, and some partner does not agree to an earlier dissolution which justice may seem to require.

Smith *v.* Everett, 126 Mass. 304 (where one member was led into firm by false representations of other)

Richards *v.* Todd, 127 Mass. 167 (fraudulent representations; the results)

Arnold *v.* Brown, 24 Pick. 89 (habitual drunkenness of partner)

Parsons on Partnership, sec. 358.

A partnership at will is treated as dissolved from the date of filing a bill for accounting and dissolution.

Wiggins *v.* Brand, 202 Mass. 141.

4. *Final Accounting and Settlement.*

This may be granted where there is a dissolution by ending of the term, by court decree, by mutual agreement, or after death of one partner.

Wiggins *v.* Brand, 202 Mass. 141 (rights of dissolving partner discussed)

Freeman *v.* Freeman, 136 Mass. 260 (one partner dead)

Topliff *v.* Jackson, 12 Gray 565 (relief in equity sought in action of contract)

Murphy *v.* Murphy, 217 Mass. 233 (to compel administrator of deceased partner to release interest in saloon, under agreement made *inter vivos*)

An equity court has full power to appoint a receiver, order claims proved, assets sold and proceeds of sale distributed to creditors and partners, even though the firm afterwards turns out to be insolvent.

White *v.* White, 169 Mass. 52.

The limitation of the period for bringing suits for

an accounting begins to run from the termination of the partnership.

McMahon *v.* Brown, 219 Mass. 23.

5. *Contribution between Partners.*

A partner who has paid more than his share of partnership debts is entitled in a suit in equity to recover full contribution from his solvent co-partners within the court's jurisdiction.

Whitcomb *v.* Converse, 119 Mass. 38.

Whitman *v.* Porter, 107 Mass. 522.

One may have an accounting against his partner when the firm has ceased to do business, though it is not actually dissolved.

Lovejoy *v.* Bailey, 214 Mass. 134.

But a bill in equity should be for a general[4] accounting and not for contribution as to a single item paid by the plaintiff.

Phillips *v.* Blatchford, 137 Mass. 510.

C. Certain Suits between Persons Having or Claiming Interests in a Common Subject Matter, which Interests Fall Short of Constituting a Partnership, are Brought in Equity.

1. *Suits between co-owners.*

In some states co-owners of real estate, not co-partners, may still have partition proceedings in

[4] But *quaere* as to whether all partners must be joined as defendants. Bowker *v.* Torrey, 215 Mass. 547.

equity. Co-owners of chattels may do this in Massachusetts.

Mass. Rev. Laws, ch. 159, sec. 3, cl. 4 (of chattels. Passed in 1891)

Blood *v.* Blood, 110 Mass. 545 (no jurisdiction before above statute)

2. *Suits where there are three or more parties having "distinct rights or interests which cannot be justly and definitely decided and adjusted in one action at law."*

Mass. Rev. Laws, ch. 159, sec. 3, cl. 3.

In an action at law several plaintiffs in the same suit must have a joint interest in the subject matter. So must several defendants.

In equity, persons having distinct interests in the subject matter may be joined as parties plaintiff or defendant in certain causes where a judgment between two of the parties would leave open to one or both a controversy with a third party.

(Bill by administrator against numerous holders of notes of a series, to determine validity, dependent on same facts in each case.)

Carr *v.* Silloway, 105 Mass. 543.

3. *Suits in which a stakeholder summons several persons claiming a fund, debt or property from the same source, for the purpose of determining to whom he is liable. Such a suit is known as interpleader.*

Cobb *v.* Rice, 130 Mass. 231 (custodian of bonds against former owner's wife and bankruptcy trustees to determine ambiguity as to ownership)

Morse *v.* Stearns, 131 Mass. 389 (legatee incorrectly named)

Order of the Golden Cross *v.* Merrick, 163 Mass. 374 (to determine to whom benefit fund should be paid)

Bodman *v.* Am. Tract Society, 9 Allen 447 (ambiguity as to legatee, where two of same name)

Union Bank *v.* Pool, 143 Mass. 203 (mortgagee, after foreclosure, as to surplus)

Robinson *v.* Wiley, 188 Mass. 533 (by attorney against his client and client's alleged assignee)

Cogswell *v.* Newburyport Inst. for Sav., 165 Mass. 524 (by administrator against bank and claimant)

The object of interpleader is not to protect a person against double liability but against double vexation on account of one liability.

Fairbanks *v.* Belknap, 135 Mass. 179, at 184.

National Security Bank *v.* Batt, 215 Mass. 489.

One may not bring interpleader,

a. If he claims any part of the fund himself;

Ladd *v.* Chase, 155 Mass. 417 (an executor who was also residuary legatee.)

But see Cogswell *v.* Newburyport Inst. for Savings, *supra.*

b. Or if not a disinterested stakeholder;

National Life Ins. Co. *v.* Pingrey, 141 Mass. 411 (where an insurance company might be liable to two persons).

Conn. Mutual Life Ins. Co. *v.* Cook, 219 Mass. 222[5].

Stone *v.* Reed, 152 Mass. 179.

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[5] See page 22.

c. Or if the several claims are *distinct in origin*;

Third Nat'l Bank *v.* Skillings, 132 Mass. 410.

Macy *v.* Nantucket, 121 Mass. 351 (against two towns to see in which plaintiff is properly taxed).

Welch *v.* Boston, 208 Mass. 326 (overturning, as a precedent, Forest River Lead Co. *v.* Salem, 165 Mass. 193, in which boundary between Salem and Marblehead was determined on interpleader in tax case).

d. Or if there has been judgment against the stakeholder on one claim.

Provident Inst. *v.* White, 115 Mass. 112.

The first decree in *interpleader* is that the defendants interplead, after which plaintiff may not be heard. A final decree then determines to which claimant the fund or property belongs and directs its delivery by the plaintiff.

Houghton *v.* Kendall, 7 Allen 72.

Conn. Mutual Life Ins. Co. *v.* Cook[5], 219 Mass. 222 (see motion for decree therein).

By statute in many jurisdictions a stakeholder, if sued *at law* or in equity, may cause to be summoned to defend the suit any adverse claimant, in which case the ownership of the fund is determined equitably. This is sometimes called "statutory interpleader."

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[5] In this case the claimants alleged by the petitioner were an insured and an assignee of the insured. The latter's answer claimed that the company was obligated to him in the matter, apart from the assignment. The plaintiff, by failing to join issue, admitted the truth of the answers. The plaintiff paid the insurance money into court and moved it be relieved from liability and the defendants ordered to interplead. Bill was dismissed because there was a claim which could not be adjudicated between the defendants alone.

Mass. Rev. Laws, ch. 173, secs. 37, 38. Mass. St. 1908 ch. 590, sec. 50.

Russell *v.* Webster, 213 Mass. 491 (bill by alleged donee against stakeholder of stock and a claimant).

Brierly **v.** Equitable Aid Union, 170 Mass. 218.

Nelson **v.** Piper, 213 Mass. 531.

Phillips **v.** Suffolk Savings Bank, etc., 219 Mass. 597.

"*A bill in the nature of a bill in interpleader*"[6] is, strictly speaking, one in which a plaintiff who has some *equitable* interest in the subject matter seeks to establish his interest against some one of two or more claimants of some other interest.

Killian **v.** Ebbinghans, 110 U. S. 568.

Aleck **v.** Jackson, 49 N. J. Eq. 507; 2 Ames 45.

See cases in note, 2 Ames 46.

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[6] The distinction in Massachusetts between strict interpleader and "bills in the nature of bills of interpleader" has not always been observed. Nor are the strict requisites of either important where jurisdiction may be brought within ch. 159, sec. 3, clause 3, of the Revised Laws. Hammond *v.* Putnam, 110 Mass. 232 (incorrectly called "in the nature of a bill of interpleader"); Macy *v.* Nantucket, 121 Mass. 351.

CHAPTER III.

SOME FEATURES OF EQUITY JURISDICTION AND PROCEDURE.

A. PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW.

a. Its absence a basis of relief in equity.

b. Its presence as a defense to equitable procedure.

c. Its presence in some cases immaterial.

d. As affecting procedure.

B. THE JURY IN EQUITY.

C. EQUITY ACTS in personam, NOT in rem.

A. "PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW."

Definition: An adequate remedy at law has been defined as one "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

a. *Its absence a basis of relief in equity.*

The inadequacy of legal remedies was one cause of the rise of equity jurisdiction. In respect to some subject matter, parties, and remedies, that jurisdiction is exclusive, as has been seen. In respect to other subject matter, where the estate, title or interest in dispute is legal and the law courts afford a remedy *similar in form* to that of the equity courts (as money damages) but where the method of reaching this remedy under law procedure is not, upon

the facts of a case, plain, adequate and complete, then jurisdiction at law and in equity is *concurrent.*

Jones *v.* Newhall, 115 Mass. 244 (1874)[1] (excellent discussion).

Pierce *v.* Equitable Life Assurance Soc., 145 Mass. 56 (equitable accounting on tontine policy because of complexity of accounts).

Smith *v.* Smith, 148 Mass. 1 (relief in nuisance is not to determine legal right, but because of inadequacy of legal remedy).

Or the inadequacy of legal remedies may consist in the necessity at law of bringing actions *against various people*, or *successive actions against the same person.* In certain cases, the jurisdiction in equity is based on the desirability of avoiding a multiplicity of suits at law. The equity court may settle the entire controversy in one suit.[2]

Slater *v.* Gunn, 170 Mass. 509 (trespass).

Boston & Maine R. R. *v.* Sullivan, 177 Mass. 230 (to avoid successive actions against same person).

Carr *v.* Silloway, 105 Mass. 543 (to avoid numerous actions against various persons).

M. Steinert & Sons Co. *v.* Tagen, 207 Mass. 394 (repeated malicious acts in a strike, though no evidence of damages).

Stevens *v.* Rockport Granite Co., 216 Mass. 468 (nuisance).

But equity does not take jurisdiction on this

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[1] This case was decided before the Massachusetts courts had full equity jurisdiction. See table on Page 5.

[2] See subdivision C under Equitable Parties, Chapter II.

ground, where there are different persons named as defendants, whose obligations are several.

Rogers *v.* Boston Club, 205 Mass. 261 (suit by receiver against club members for dues owed).

Or the greater adequacy of equitable relief over legal in a particular case may result from the greater flexibility of the equitable remedies. An attachment of a law court reaches only property capable of being taken on execution; while equity, acting *in personam*, is able to reach property of such a nature that it cannot be taken on execution.

Wilson *v.* Martin-Wilson, etc. Co., 149 Mass. 24 (creditor's bill to reach interest in patent, owned by a foreign corporation doing business here).

b. *Its presence as a defense to equitable procedure.*

Conversely, equity does not ordinarily take jurisdiction of a matter where the relief afforded in a law[3] court is plain, adequate and complete.[4] This is true,—

1. Where some remedy at law, open to the plaintiff, would afford the same relief as that sought in

[3] But where the legal remedy sought is *certiorari* (a remedy at law) it is a defense that there is an adequate remedy in equity. Rudnick *v.* Murphy, 213 Mass. 470.

[4] This principle is as old as English Chancery jurisdiction, is in the U. S. Judiciary Act of 1789 (now 36 U. S. Stats. at Large 1163), was formerly expressly stated in the Massachusetts Statutes (see Public Statutes, chap. 151, sec. 2), but is omitted in the Revised Laws, which (in chap. 159) afford juridiction in equity of all matters cognizable under the general principles of equity jurisprudence. It is expressly made a condition of equitable jurisdiction under some statutes, however. See Mass. St. 1914 ch. 778, relative to injunctions in industrial disputes.

the bill, or one equally adequate under the particular facts.

Farrar *v.* Pillsbury, 217 Mass. 330 (failure to pay off a mortgage, as agreed).

Adams *v.* Messinger, 147 Mass. 185 (general discussion).

Greenhood *v.* MacDonald, 183 Mass. 342 (will not lie to restrain collection of taxes).

Allen *v.* Hunt, 213 Mass. 276 (equity will not determine what could be determined by probate accounting).

Preston *v.* Newton, 213 Mass. 483 (owner of land illegally taken by municipality has remedy at law).

Thus, while equity will always compel specific performance of proper contracts to convey land, art treasures, shares in close corporations, patents, etc., it will leave the agreed vendee to his action for damages at law, as an adequate remedy, if the subject matter is ordinary personal property, government or municipal bonds, and (except in some jurisdictions, as England and Massachusetts) other shares commonly dealt in, on the market.

Old Colony R. Corp. *v.* Evans, 6 Gray 25 (land).

Somerby *v.* Buntin, 118 Mass. 279 (patents).

Leach *v.* Fobes, 11 Gray 506 (Mass. rule on stocks).

Clark *v.* Flint, 22 Pick. 231 (ordered as to other personal property where purchase money is paid but vendor becomes insolvent before delivery).

2. Where the facts of the particular case are not embraced in any equitable doctrine, because the

relief of the law courts, by a wholly different kind of remedy, has always been regarded as adequate.

N. E. Mut. Life Ins. Co. *v.* Phillips, 141 Mass. 535.

c. *Its presence in some cases immaterial.*

Today, in courts of general equity jurisdiction (such as Massachusetts, since 1877) relief may be had in certain cases either at law *or* in equity, at the election of the plaintiff.

Billings *v.* Mann,[5] 156 Mass. 203 (deed obtained by fraud. Remedy by writ of entry at law or cancellation in equity).

Nathan *v.* Nathan, 166 Mass. 294 (fraud in ante-nuptial contract).

d. *As affecting procedure.*

While courts of general equity powers may entertain bills relating to matters in their nature within the concurrent jurisdiction of such courts, yet the usual practice is to remit parties in such cases to their remedy at law, provided that be adequate; but independent of statute restrictions, the objection is a matter of equitable *discretion* rather than of jurisdictional right (and therefore not always available on demurrer).[6]

Jones *v.* Newhall, 115 Mass. at page 252 (citing English cases, which see).

Suter *v.* Matthews, 115 Mass. 253 (fraud).

The failure of the defendant to raise in the pleadings the objection that there is an adequate remedy

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[5] Compare Boardman *v.* Jackson, 119 Mass. 161.

[6] Prior to the general equity jurisdiction in Massachusetts (in 1877), the objection was properly raised by demurrer.
Jones *v.* Newhall (*supra*).
Clark *v.* Flint, 22 Pick. 231.

at law, or his waiver of the question in argument, does not give a court in equity jurisdiction over a case which because of the subject matter has no standing in equity.

Moseley *v.* Bolster, 201 Mass. 135 (partition will not be made in equity in Massachusetts, though incidental questions may be there determined).

N. E. Mut. Life Ins. Co. *v.* Phillips, 141 Mass. 535 (to determine whether certain persons have been legally chosen directors of a corporation).

Kenny *v.* Consumers Gas Co., 142 Mass. 417 (information by Attorney-General at relation of private individual cannot be used to enjoin exercise of public functions).

Dunham *v.* Presby, 120 Mass. 285 (bill for accounting of partnership profits in illegal trading).

Cox *v.* Malden and Melrose Gas Light Co., 199 Mass. 324 (mandamus is proper remedy to compel corporation to perform quasi-public duty).

But such failure may give the court jurisdiction if the subject matter is of a kind that equity may assume jurisdiction of on any facts; or may give the court jurisdiction of persons not otherwise under its control.

Fourth National Bank *v.* Mead, 214 Mass. 549 (rule stated).

Detroit *v.* Detroit Citizens' St. Ry. Co., 184 U. S. 368 (good discussion).

Creely *v.* Bay State Brick Co., 103 Mass. 514 (nuisance).

Whiting *v.* Burkhardt, 178 Mass. 535 (bill by assignee of mortgagee's interest, under

insurance policy, to recover amount of policy from company).

Allen *v.* Hunt, 213 Mass. 276 (cases collected).

And in such cases the objection, though properly pleaded, will be deemed to be waived, unless contended for at the hearing.

Page *v.* Young, 106 Mass. 313.

Bauer *v.* International Waste Co., 201 Mass. 197.

An equity court having obtained jurisdiction over a cause for any purpose, may retain it for all purposes and proceed under the prayer for general relief to a determination of all matters in issue,[7] although a court of law could grant the same relief. This is for the purpose of preventing a multiplicity of suits.

Winslow *v.* Nayson, 113 Mass. 411 (bill for injunction to prevent trespass retained to award damages).

Long *v.* Athol, 196 Mass. 497 (bill for cancellation of contract; recovery for work and labor).

Smith *v.* Everett, 126 Mass. 304 (bill for cancellation of partnership articles entered into by fraud; repayment of money ordered).

Page *v.* Franklin, 214 Mass. 552 (damages for contractual breach in suit to compel mortgage discharge).

But if the plaintiff fails to show his cause within equitable jurisdiction at all, the court will not deal with the strictly legal rights and remedies involved, but will dismiss the bill without prejudice, or (in

[7] But see Revere *v.* Revere Water Co., 218 Mass. 161.

Massachusetts) may permit the action to be changed by amendment into a suit at law.

Mitchell *v.* Dowell, 105 U. S. 430.

Mass. Rev. Laws, ch. 159, sec. 6; ch. 173, sec. 52; as amended by St. 1911 ch. 275.

Cromwell *v.* Norton, 193 Mass. 291 (case changed from equity to law).

But where a plaintiff, entitled to relief in equity, brings his bill, but, *pendente lite*, there is such a change in circumstances as to make equitable relief inappropriate, the court will retain the bill and award damages, if these are appropriate.

Lexington Print Works *v.* Canton, 171 Mass. 414.

In a case where the plaintiff, seeking specific performance, discovers that *before the bill was brought*, the defendant has made specific performance impossible, the court may retain the bill and award damages.

Milkman *v.* Ordway, 106 Mass. 232.

In controversies concerning property, equity does not take jurisdiction (apart from statute) of cases involving less than one hundred dollars, unless there is some peculiar value in the property aside from its intrinsic worth.

Chapman *v.* Banker & Tradesman Co., 128 Mass. 478[8] (equitable attachment by "statutory creditor's bill." Less than one hundred dollars. No jurisdiction).

Wilkinson *v.* Stitt, 175 Mass. 581 (jurisdiction taken in matter of a prize cup worth sixty dollars, which had sentimental value to bicycle club).

[8] Decided prior to St. 1884, ch. 285 (now part of Revised Laws, ch. 159, sec., 3 cl. 7).

Mass. Rev. Laws, ch. 159, sec. 3, cl. 7 (giving jurisdiction in certain cases).

B. The Jury in Equity.

In the Federal Courts there is no constitutional right to trial by jury in *equity* or *admiralty*; although the right is guaranteed in suits at *common law* by Article VII of Amendments to U. S. Constitution.

In Massachusetts, Article 15 of the Declaration of Rights gives the right to jury trial in "all controversies concerning property, and in all suits between two or more persons, *except in cases in which it has heretofore been otherways used and practised.*"

This exception is now held to include only such equity cases as were within Chancery jurisdiction in England at the time of the adoption of the Massachusetts Constitution in 1780.[9] In such cases there is no right to jury trial in Massachusetts.

Parker *v.* Simpson, 180 Mass. 334, at 344.

Shapira *v.* D'Arcy, 180 Mass. 377.

Therefore, in cases in which statutes have given relief not included within general equity jurisprudence in 1780, the *defendant* at least has a right to trial by jury.

Powers *v.* Raymond, 137 Mass. 483 (statutory creditor's bill).

Stockbridge *v.* Mixer, 215 Mass. 415 (right to jury trial as to essentially legal issues in the case, but not as to those purely equitable).

It will be deemed that a jury has been waived unless the demand for it is "seasonably asserted."[10]

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[9] The exception includes also, of course, divorce and probate cases, and the extraordinary writs (such as mandamus, etc.).

[10] In an equity case, the jury may be claimed within 10 days after the replication is filed. Stockbridge *v.* Mixer, 215 Mass. 415.

Dole *v.* Wooldredge, 142 Mass. 161.
Parker *v.* Nickerson, 137 Mass. 487 (where a master had already been appointed).

When there is a right to jury trial, issues framed to cover the disputed points may be submitted to the jury, instead of the whole case.

Proprietors Charles River Bridge *v.* Prop. Warren Bridge, 7 Pick. 344.
Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45.

When there is no constitutional right to jury trial, the court under statutes may, in its discretion, at the request of a party, submit issues to a jury; and the verdict will be deemed as conclusive as a verdict of a jury at law.

Franklin *v.* Greene, 2 Allen 519.
Kohn *v.* McNulta, 147 U. S. 238.
Parker *v.* Simpson, 180 Mass. 334 (jury trial denied because over one hundred exhibits, etc.).
Mass. Rev. Laws., ch. 159, secs. 36-38.
Dexter *v.* Codman, 148 Mass. 421 (verdict set aside).

In jurisdictions other than Massachusetts, it is generally the rule that the findings of a jury on issues of fact are only advisory.

Kohn *v.* McNulta, *supra*.
Metcalf *v.* Metcalf, 85 Me. 473.

But the Supreme Court may revise the discretion of the Superior Court in refusing to frame issues, where there is no constitutional right, but will not do so unless the party asking revision shows the case to be one more satisfactorily tried before a jury than a judge.

Culbert *v.* Hall, 181 Mass. 24.

C. Equity Acts in Personam, not in Rem.[11]

Apart from statutes, decrees in equity do not operate of themselves to transfer rights or titles of property nor do they operate against the whole world. They direct *parties to the action* to do or not to do certain specific acts; the penalty for disobedience is punishment for contempt.

Dillon *v.* Heller, 39 Kansas 599; Ames, 14.

McCann *v.* Randall, 147 Mass. 81.

Wilson *v.* Martin-Wilson etc. Co., 151 Mass. 515.

Where the parties are within the jurisdiction.

A suit in equity cannot ordinarily be maintained in the court in which it is brought against a resident of that or any other jurisdiction unless he is found within the jurisdiction and served with process there.

Spurr *v.* Scoville, 3 Cush. 578.

Merrill *v.* Beckwith, 163 Mass. 503; Ames 19.

Hart *v.* Sansom, 110 U. S. 151; Ames 11 (cloud on title).

Pingree *v.* Coffin, 12 Gray 288, at Page 305. See note page 21, Ames; see also Harris *v.* Graham, 110 Fed. Rep. 896.

If the court has jurisdiction of the parties, it is usually immaterial that the property in issue lies outside of the jurisdiction of the court. Equity may order specific performance of an agreement relating to such property.

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[11] For other meaning of these phrases, see the admirable discussion by Holmes J. in Tyler *v.* Court of Registration, 175 Mass. 71.

Penn *v.* Lord Baltimore, 1 Vesey 444.
Pingree *v.* Coffin, 12 Gray 288, at page 304.
Adams *v.* Messinger, 147 Mass. 185.

It may order the cancellation of a deed and the re-conveyance of foreign property.[12]

Johnson *v.* Scott, 205 Mass. 294 (recission of purchase of Maine land, for fraud; decree that Maine title was bad).

Gardner *v.* Ogden, 22 N. Y. 327; Ames 6.

It may enjoin against the prosecution of a suit in another jurisdiction.

Kempson *v.* Kempson, 58 N. J. Eq. 94; Ames 26.

Debon *v.* Foster, 4 Allen 545.

Carson *v.* Dunham, 149 Mass. 52.

It may enjoin against the commission of a tort in another state.

Great Falls Mfg. Co. *v.* Worcester, 23 N. H. 462.

Alexander *v.* Tolleston Club, 110 Ill. 65.

Carteret *v.* Petty, 2 Swanston 323, Ames 21 (not decreed because of practical difficulty).

An equity court will usually refuse to foreclose a mortgage on foreign land, as a matter of discretion.

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[12] But the conveyance of foreign land by a master appointed by the court need not be recognized by the courts where the land is situated. Fall *v.* Eastin, 215 U. S. 1, and note therewith. The conveyance of land by the owner under an order of the court is, however, regarded as voluntary and therefore usually recognized by a foreign court. Witters *v.* Globe Sav. Bk., 171 Mass. 425.

Naton *v.* McCall, 86 Me. 350 (Nova Scotia mortgage).

The jurisdiction to foreclose undoubtedly exists, and is frequently exercised in the case of railroad mortgages covering property a part of which is without the jurisdiction.

Muller *v.* Dows, 94 U. S. 444.

Union Trust Co. *v.* Olmstead, 102 N. Y. 729; Ames 23 (railroad in part in Pennsylvania).

Where the principal parties are without the jurisdiction.

Where the subject matter (*res*) is within the jurisdiction and the parties without, the court frequently finds a way of making a decree affecting the subject matter.

McCann *v.* Randall, 147 Mass. 81 (equitable attachment of U. S. Treasury draft, payable to non-resident, found here unindorsed in custody of agent. Injunction against agent, who if he transfer may be compelled to pay, himself)[13]

Gahm *v.* Wallace, 206 Mass. 39 (attachment of non-resident's real estate without service on him. Decree that if he should not pay in thirty days property be taken on execution).

And statutes are common permitting the passing of the title where the property is within the jurisdiction but the defendant is outside and served with

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[13] In Moors *v.* Ladenburg, 178 Mass. 272, where it was sought to enjoin a proceeding at law in Massachusetts, service on a non-resident defendant's Massachusetts attorney was held to be service on the defendant. The court asserts that "When you have a *res* within the jurisdiction of the court, the court may deal with it although it cannot reach the person of the owner." This statement is apparently broader than the case.

process by publication only. In such a case the jurisdiction may only affect the particular property and not bind the individual so as to be recognized by courts of other jurisdictions.

Pennoyer *v.* Neff, 95 U. S. 714 (discussion of "due process of law").
Dillon *v.* Heller, 39 Kan. 599; Ames 14.
Arndt *v.* Griggs, 134 U. S. 316.
Short *v.* Caldwell, 155 Mass. 57.
Tyler *v.* Court of Registration, 175 Mass. 71.
Biggert *v.* Straub, 193 Mass. 77 (*in rem*, under a statute).

Restraining suits at law.

The supremacy of equitable over legal rules is shown in the fact that equity may restrain, by injunction, either party to a law suit, either within or without the jurisdiction, from further proceeding with the suit or with a particular defense.[14]

How certain decrees are made operative.

When one otherwise liable to be ordered by a court of equity is a minor or insane, the only decree which the court will make, in the absence of statute,[15] is

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[14] See Chapter VIII herein.

[15] In Massachusetts the court may appoint a person to make a conveyance for an incompetent or absent trustee, or require a guardian to make it, and a decree may vest a title without a conveyance.
Rev. Laws ch. 147, secs. 4-6 (title of new trustee vests by virtue of appointment)
Rev. Laws ch. 147, sec. 17 (a trustee to complete a sale)
Merrill *v.* Beckwith, 163 Mass. 503; Ames 19. (not to apply to non-resident agreed vendee not served with process)
Mass. St. 1910, ch. 376 (title vests without conveyance where party directed fails to obey decree)
Walsh *v.* Walsh, 116 Mass. 377
Felch *v.* Hooper, 119 Mass. 52
Nugent *v.* Cloon, 117 Mass. 219
Eastern Bridge etc., Co. *v.* Worcester Auditorium Co., 216 Mass. 426.

that the person perform the decree when the disability is removed.

Pegge *v.* Skynner, 1 Cox Eq. 23; Ames 6 (paralytic).

Whitney *v.* Stearns, 11 Met. 319.

The plaintiff, if he fears that the defendant is about to leave the state, may obtain the seldom used writ of *ne exeat regno* to prevent his departing without furnishing security.

Rice *v.* Hale, 5 Cush. 238.

Griswold *v.* Hazard, 141 U. S. 260.

CHAPTER IV.

THE MAXIMS.[1]

A. EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY.

B. EQUITY FOLLOWS THE LAW.

C. WHERE THE EQUITIES ARE EQUAL, THE LAW WILL PREVAIL.

D. WHERE INTERESTS ARE PURELY EQUITABLE AND IN OTHER RESPECTS EQUAL, PRIORITY IN TIME GIVES THE BETTER EQUITY.

E. EQUITY TREATS THAT AS DONE WHICH OUGHT TO BE DONE.

F. HE WHO SEEKS EQUITY MUST DO EQUITY.

G. HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS.

H. EQUITY AIDS THE VIGILANT.

Underlying the doctrines of equity and at the basis of this system of jurisprudence are certain general principles called maxims. They are principally useful today because they show the spirit of equity. Among them are:

A. EQUITY WILL NOT SUFFER A WRONG TO BE WITHOUT A REMEDY.

This does not refer to moral wrongs (as ingratitude) but only to such wrongs as are coupled with legal duties and to such remedies as are consistent with

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[1] For a particularly full treatment see Eaton on Equity, Ch. III, and Merwin, Ch. VI.

the laws of the land and authorized by the principles and practises of courts of equity.

Thus equity will afford relief, where a statute or constitution creates a new right, equitable in nature, but provides no method for its enforcement.

Hunter *v.* Boston, 218 Mass., 535 (bond with no statutory method of enforcing).

Gibson *v.* Supervisors, 80 Cal. 363.

Gilchrist *v.* Railroad Co., 58 Fed. Rep. 708 (lien with no method in statute of enforcing).

But equity will not on this ground interfere in contested elections, for example, as these are matters over which equity has no control apart from statute.

Dickey *v.* Reed, 78 Ill. 262.
Skrine *v.* Jackson, 73 Ga. 377.

The mere fact that a legal remedy has failed under the particular circumstances to afford the relief, is not ground for the application of this maxim.

Heine *v.* Commissioners, 19 Wall. 655.

Rees *v.* Watertown, 19 Wall. 121 (where a holder of bonds had brought mandamus against city officials to force payment but failed because there was no officer who could be served with process.)

B. Equity Follows the Law.

I. Equity follows legal rules when legal rights are in question in equity courts. Thus, it requires

a. Compliance with statutory prerequisites to the validity of instruments;

Townsley *v.* Chapin, 12 Allen 476 (deed).

b. Conformity to legal rules, (as where a wife or her assignee has claims against a husband or his insolvent estate);

Fowle *v.* Torrey, 135 Mass. 87.

Nat'l Granite Bank *v.* Tyndale, 176 Mass. 547.

Heard *v.* Stanford, Cases *temp.* Talbot, 173.[2]

c. Application of same rules of construction and interpretation of instruments as at law;

Hedges *v.* Dixon County, 150 U. S. 182 (case of municipal bonds invalid from lack of authority).

Merriam *v.* Boston, etc., Co., 117 Mass. 241.

d. Adherence to same rules of evidence, and of procedure;

Hennessy *v.* Preston, 219 Mass. 61 (special contract must be proven in bill to reach and apply in same way as in action of contract).

Anthony *v.* Valentine, 130 Mass. 119 (plaintiff cannot show by oral evidence that defendant agreed not to collect a certain note except on certain conditions.

Strout *v.* United Shoe Mach. Co., 215 Mass. 116 (in the allowance of amendments).

e. Distribution of legal assets, as at law.

Jones *v.* Arena Pub. Co., 171 Mass. 22.

Old Colony Trust Co. *v.* Medfield etc. Railway, 215 Mass. 156.

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[2] A wife's personal property formerly became her husband's on marriage. In Heard v. Stanford, a woman had some property, owed a debt, married, and then died before the debt was paid. The creditor was without remedy, as at law the husband was not liable after her death to her creditors, although he was during coverture.

But where fraud or mistake is the foundation of a bill to reform an instrument or is a defence to a bill specifically to enforce, the rule against the varying of the terms of a written instrument by parol evidence is of necessity abrogated.

Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45.

Williams *v.* Carty, 205 Mass. 398.

And in equity a conveyance absolute on its face may be shown to be a mortgage.

Campbell *v.* Dearborn, 109 Mass. 130.

II. Where there is a clear analogy between legal and equitable interests and estates, though not absolutely bound by them, equity ordinarily follows by analogy the rules of the law, so far as applicable to the corresponding equitable subject matter.

Thus, words used in creating a trust will be given the same effect as if used in creating a legal estate.

Ditrell *v.* Carlisle, 48 Miss. 691.

And the statute of limitations governing actions on analogous legal rights will be applied by analogy to suits founded on equitable rights, at least to the extent of not being exceeded without good cause.[3]

Dodge *v.* Essex Ins. Co., 12 Gray 65.

Church *v.* Winton, 196 Penn. 107.

Shelton *v.* Sears, 187 Mass. 455 (claim of dower after statutory time).

Eddy *v.* Fogg, 192 Mass. 543 (right of partner to ask for accounting lasts only six years from dissolution).

[3] See the subject of Laches, under the Maxim "Equity Aids the Vigilant."

But where the case is one of concurrent jurisdiction (as account) it is clear that equity considers statutes of limitation binding *suo vigore.*

Ela *v.* Ela, 158 Mass. 54.

The period of limitation in fraud, however, frequently runs from the knowledge of that fraud.

Manning *v.* Mulrey, 192 Mass. 547 (relief twenty-one years after the fraud).

C. Where the Equities are Equal, the Law Will Prevail.

If two parties have equal equitable rights or titles and one has the legal title in addition, equity will not interfere.

Bridge *v.* Conn. Mutual Life Ins. Co., 152 Mass. 343.

Mercantile Marine Ins. Co., *v.* Corcoran 1 Gray 75.

Elmore *v.* Symonds, 183 Mass. 321.

Ellis *v.* Boston H. & E. R. Co., 107 Mass. 1.

Wenz *v.* Pastene, 209 Mass. 359.

See cases cited in Ames Cases on Trusts, p. 328 (with special reference to successive assignments).

Examples (from Merwin.)

1. A gives the same day contracts to sell the same piece of real estate to B and C, each of whom is ignorant of the other's possession of an agreement. A subsequently conveys to C. C's title will prevail over B's, as he has the *legal and equitable* title as against B's *equitable.*

2. If B obtains from A, by fraud, a deed to land, and immediately conveys to C, an innocent

purchaser for value, C's title will prevail as he has the legal title.[4]

But as a donee gets only such estate as the donor can give, his legal estate will be subject to any equitable estate or interest in the land, possessed by another.

Woodard *v.* Woodard, 216 Mass. 1.

D. Where Interests are Purely Equitable and in Other Respects Equal, Priority in Time Gives the Better Equity.

If two persons hold successive assignments of the same chose in action or equitable interest, in the absence of estoppel the earlier in time prevails at law and in equity, irrespective of which one first gives notice to the debtor or trustee.[5]

Lucas *v.* Barrett, 1 Greene (Iowa) 510.

Thayer *v.* Daniels, 113 Mass. 129.

Putnam *v.* Story, 132 Mass. 205.

Herman *v.* Conn. Mutual Life Ins. Co. (estoppel prevented first assignee from prevailing) 218 Mass. 181.

But in the case of unequal equities, the superior will prevail without respect to time.

Belknap *v.* Belknap, 5 Allen 468 (the equities of other cestuis are superior to those of the assignee of the equitable interest of a cestui who is also the absconding trustee).

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[4] But *contra*, if deed from A to B was a forgery, in which case it was void, not merely voidable.

[5] The opposite rule exists in England, where the one prevails who first gives notice. Dearle *v.* Hall, 3 Russell 48; Ames Cases on Trusts, 323. See Mercantile Marine Ins. Co. *v.* Corcoran, 1 Gray 75, an early Massachusetts case where Dearle *v.* Hall is cited with approval, but in which the defendant appears to have obtained the legal title, without notice of the plaintiff's claim. See also Bridge *v.* Conn. Mutual Life Ins. Co., 152 Mass. 343.

Peek *v.* Peek, 77 Cal. 106.

E. Equity Treats that as Done which Ought to be Done.

Upon this maxim rests the doctrine of equitable conversion (treated at length in Chapter V).

It also supports the doctrine of equitable liens, under which equity enforces in the manner of liens, agreements that certain property shall be chargeable for certain obligations.

Westall *v.* Wood, 212 Mass. 540.

F. He Who Seeks Equity Must Do Equity.

One cannot compel in equity the other party to a contract to perform his part, if he has failed to perform his own obligations or to tender performance thereof (although no tender is necessary if the other has refused to perform).

McMurtrie *v.* Guiler, 183 Mass. 451.

Washburn *v.* White, 197 Mass. 540.

Wenz *v.* Pastene, 209 Mass. 359.

Butterick Pub. Co. *v.* Fisher, 203 Mass. 122.

Curtiss *v.* Sheffield, 213 Mass. 239 (under certain conditions, one seeking to have tax deed declared invalid must first pay re-assessed tax on property).

A mortgagor who seeks to redeem must pay, in addition to the mortgage debt, sums for which he has orally agreed the mortgage shall stand as security.[6]

Joslyn *v.* Adams, 5 Allen 62.

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[6] This does not apply to the holder of a subsequent interest, without notice, who seeks to redeem from the mortgage.

Whitney *v.* Metallic Wire Screen Mfg. Co., 187 Mass. 557.
Brooks *v.* Brooks, 169 Mass. 38.

When a contract is rescinded, the plaintiff is required to put the other party in *statu quo*.

McSorley *v.* Larissa, 100 Mass. 270. (Bill to redeem. One who had bought from the mortgagee in possession must be compensated for improvement).

Atkins *v.* Atkins, 195 Mass. 124 (in setting aside conveyance, part of consideration paid must be returned).

The adverse equity is sometimes raised by estoppel.[7]

Brownell *v.* White, 87 Md. 54 (where innocent occupants are allowed to pay taxes and make improvements).

Berry *v.* Friedman, 192 Mass. 131.

Mass. Rev. Laws, ch.179, sec. 17-24 (compensation for improvements if tenant in writ of entry has had possession for six years, or under apparently good title).

The equity required is only as to the subject matter in controversy.

Brooks *v.* Brooks, 169 Mass. 38 (redemption from a mortgage does not require payment of subsequent indebtedness).

G. He Who Comes Into Equity Must Come With Clean Hands.[8]

Equity refuses its aid[9] to one guilty of unlawful or inequitable conduct in relation to the subject matter.

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[7] The doctrine of Estoppel (see Ch. V) is based on this maxim.

[8] This maxim differs from the one next before in that it is one of inaction rather than action. It is similar to the legal maxim "*In pari delicto, potior est conditio defendentis.*" It has been applied in Massachusetts in a divorce case. See Ewald *v.* Ewald, 219 Mass. 111.

[9] But by statute, one who has made margin purchases of stock may seek relief in equity. Mass. R. L., ch. 99, secs. 4-7; Fiske *v.* Doucette, 206 Mass. 275.

Loud *v.* Pendergast, 206 Mass. 122 (plaintiff violated same restrictions).

Wheeler *v.* Sage, 1 Wall. 518 (Division refused of profits in illegal contract to despoil third person).[10]

Lovejoy *v.* Bailey, 214 Mass. 134 (plaintiff without clean hands, can't claim subrogation).

Snell *v.* Dwight, 120 Mass. 9.

Otis *v.* Freeman, 199 Mass. 160 (no aid to establish title to furniture bought by man for mistress).

Stewart *v.* Finkelstone, 206 Mass. 28 (good discussion. Restrictions).

Snow *v.* Blount, 182 Mass. 489.

Nelson *v.* Winchell & Co., 203 Mass. 75 (rule in trademark cases).

Dunham *v.* Presby, 120 Mass. 285.

Downey *v.* Gove, 201 Mass. 251 (no injunction to restrain foreclosure of mortgage given for illegal liquor).

Wilson *v.* Jackson, 204 Mass. 432.

Equity will refuse, on the application of a guilty participant, to relieve him from the consequences of his misconduct, where his claim to relief is necessarily based on his misconduct.

Lawton *v.* Estes, 167 Mass. 181 (where one of several co-tenants allows another to buy for taxes fraudulently, he cannot afterwards redeem).

But it will not refuse, if the relief sought is not based on the fraud.

Schmidt *v.* Schmidt, 216 Mass. 572.

[10] Distinguish this from Harvey *v.* Varney, 98 Mass. 118.

Lufkin *v.* Jakeman, 188 Mass. 588 (to obtain reconveyance of property conveyed in fraud of grantor's creditors).

One is not *in pari delicto* who enters into a champertous contract with an attorney, relying on the attorney and in ignorance of the illegality of the contract.

Gargano *v.* Pope, 184 Mass. 571.

Relief will be refused where one is, in respect to the subject matter, seeking to deceive the public.

Cal. Fig Syrup Co. *v.* Stearn, 73 Fed. Rep. 312 (by the use of a misleading trade name).

Connell *v.* Reed, 128 Mass. 477.

Geo. G. Fox Co. *v.* Best Co., 209 Mass. 251 (but not where false statements used in advertising have been abandoned two years before).

It is sometimes said that as "Equity is not a Court of Honor" the maxim means only that one be "legally innocent" and "equitably innocent" and not that he exhibit the highest sense of honor.

Dering *v.* Earl Winchelsea, 1 Cox 318 (n)[11] (A surety who had encouraged his principal to gamble was not thereby prevented from obtaining contribution from a cosurety for losses paid on a surety bond).

The Massachusetts rule is that it is only with regard to the plaintiff's right against the defendant that the plaintiff must come into court with clean hands.

Beekman *v.* Marsters, 195 Mass. 205 (and cases there cited).

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[11] May be found in 1 White & Tudor's Leading Cases.

Lurie *v.* Pinanski, 215 Mass. 229 (that plaintiff had attempted similar fraud on defendant and failed is immaterial).

The court will not concern itself with the respective rights of two defendants, both of whom are wrongdoers.

Johnson *v.* Scott, 205 Mass. 294.

The maxim has no application where the plaintiff's act is one that he has acquired a prescriptive right to do.

Parker *v.* American Woolen Co., 215 Mass. 176.

H. Equity Aids the Vigilant.

Where one has slept on his rights and acquiesced for a long time in existing conditions, he is said to be chargeable with laches[12] and equity then ordinarily refuses its aid. This is sometimes called a form of estoppel.

Andrews *v.* Sparhawk, 13 Pick. 393.

Marvel *v.* Cobb, 200 Mass. 293.

Mercantile Marine Ins. Co. *v.* Corcoran, 1 Gray 75 (estoppel).

In certain cases, the analogous statute of limitation at law may be the guide in determining the length of time required to constitute laches.

See under "Equity Follows the Law," *ante*.

[12] "The finding of laches is not the finding of a simple fact, but it is an inference from other facts, which may include many different elements. * * * There is no fixed rule as to what shall constitute laches, but it depends on the particular circumstances of each case. * * * Those circumstances may, on the one hand, tend to excuse delay, or, on the other hand, go to show that prompt action was imperative." C. Allen, J.. in Snow *v* Boston Blank Book Mfg. Co., 153 Mass. 456

But in other cases, the staleness of the demand may make the relief sought so highly inequitable to other persons as to induce courts of equity on this ground to refuse such relief. The length of time required to constitute laches usually depends on the facts of the particular case.

Loud *v.* Pendergast, 206 Mass. 122 (short delay, where plaintiff stood by and allowed defendant to violate restrictions, held laches).

Fuller *v.* Melrose, 1 Allen 166 (ten months' delay held laches).

Manning *v.* Mulrey, 192 Mass. 547 (twenty-one years held not laches).

Marvel *v.* Cobb, 200 Mass. 293 (bill to set aside foreclosure for fraud. Sixteen years delay held demurrable laches).

Von Arnim *v.* American Tube Works, 188 Mass. 515 (bill of minority stockholders).

In some cases, however, the delay may be so great as to constitute laches as a matter of law.

Sawyer *v.* Cook, 188 Mass. 163.

Strout *v.* United Shoe Mach. Co., 215 Mass. 116.

Marvel *v.* Cobb, 200 Mass. 293.

Stewart *v.* Joyce, 201 Mass. 307.

Doane *v.* Preston, 183 Mass. 571.

Where facts constituting laches appear on the face of the bill, a demurrer lies. Where the defendant desires to present his defense on all the facts of the case, he may set it up in his answer, in some cases even after his demurrer has been overruled. The defendant may not argue laches as a matter of right if he has not pleaded it in some form. The court

may, however, in such case refuse relief as inequitable on the facts.

Snow *v.* Boston Blank Book Mfg. Co., 153 Mass. 456.

Stewart *v.* Joyce, 201 Mass. 307.

To constitute laches there must have been either actual or imputable knowledge of the facts upon which the right to equitable relief depends.

Manning *v.* Mulrey, 192 Mass. 547.

Sunter *v.* Sunter, 190 Mass. 449.

But neither an infant nor an insane person is chargeable with laches.

Burns *v.* Thayer, 115 Mass. 89.

Denholm *v.* McKay, 148 Mass. 434.

A suit by the government to enforce a public right is not barred by the gross laches of its officers.

U. S. *v.* Insley, 130 U. S. 263.

County Commissioners of Hampshire, Petitioners, 143 Mass. 424.

Where a deed is void (rather than voidable) laches constitutes no defence to a bill to set it aside.

Ipswich *v.* Prop'rs Jeffries Neck etc., 218 Mass. 487.

CHAPTER V.

SOME DOCTRINES IN EQUITY.

A. ASSIGNMENTS.

B. NOTICE.

C. ESTOPPEL.

1. *Estoppel by Record.*
2. *Estoppel by Deed.*
3. *Estoppel in Pais.*
   a. *From Contract.*
   b. *Equitable Estoppel.*

D. EQUITABLE CONVERSION.

A. ASSIGNMENTS.

At the early common law, the right to assign a non-negotiable chose in action was not recognized.

Pomeroy, secs. 1270-1272.

But equity at an early date recognized such assignments (when on a valuable consideration) and enforced them; and the common law has for some time been so modified as to recognize the right of an assignee of a chose in action to sue in the name of the assignor, whether the assignment is in writing or not,[1] and whether for a consideration or voluntary.

[1] The term equitable assignment applied to such transfers seems to be a recognition of the former equitable jurisdiction. Its later use is to distinguish the title of the assignee from that of the assignor in whose name alone, in the absence of statute, suits at law could be brought. Grover *v.* Grover, 24 Pick. 261. It may also suggest the right of the assignee, where there is no formal assignment, to compel the assignor or his executor to make such, in equity. Herbert *v.* Simpson, 220 Mass. 480.

Grover *v.* Grover, 24 Pick. 261 (gift of a mortgage and note without indorsement; suit in name of assignor against latter's will).

Norton *v.* Piscataqua, etc. Ins. Co., 111 Mass. 532 (delivery of non-negotiable note).

Hewins *v.* Baker, 161 Mass. 320[2] (oral transfer, as collateral, of policy which expressly provided against assignment).

Wolfboro Loan & Banking Co. *v.* Rollins, 195 Mass. 323 (assignee under a foreign statute).

French *v.* Peters, 177 Mass. 568 (suit brought in equity by assignee of note and bank book where transfer was one act, without writing, and was denied by maker of note, bank, and assignor's administrator.

The transfer of title is usually by delivery of some paper representing the chose in action (as a note, or insurance policy), or by deed. A good gift may thus be made, passing the equitable title even without indorsement or formal assignment. Whether an oral gift of incorporeal personal property is sufficient, there seems to be some doubt.

Grover *v.* Grover, 24 Pick. 261.

Herbert *v.* Simpson, 220 Mass. 480.

Chadwick *v.* Covell, 151 Mass. 190 (discussion by Holmes, J.).

Herman *v.* Conn. Mutual Life Ins. Co., 218 Mass. 181 (written assignment of insurance policy without delivery of the policy held good as between the parties).

[2] This was a bill in equity of one claimant against another for possession of the policies — not against the company for payment, in which case it might have been at law.

Jones *v.* Witter, 13 Mass. 304 (*dictum* that parol assignment of debt is good).

Assignments, at law,[3] *today.*

In many states, under statutes, an assignee of a legal chose in action[4] (if the assignment is in writing[5]) may now sue at law in his own name, subject (except in the case of negotiable instruments) to all defenses and set-offs which the defendant might have had against the assignor.

Mass. Rev. Laws, ch. 173, sec. 4 (first passed in 1897).

Gilman *v.* American Prod. Con. Co., 180 Mass. 319.

Bowen *v.* N. Y. C. & H. R. R., 202 Mass. 263 (assignment must be before date of writ).

To-day, those choses in action are assignable at law that would at common law survive[6] and pass as assets to the personal representative of a decedent creditor or as liabilities against the estate of a decedent debtor. Most others are not assignable.

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[3] The adequacy of the present-day remedy at law has brought a partial loss of jurisdiction in equity. Walker *v.* Brooks, 125 Mass. 241. Merwin (in Section 95) seems erroneously to assume that equity never had such jurisdiction. But he refers to the "equitable title" of the assignee, which is inconsistent. See a clearer statement in Pomeroy, secs. 1271-1272. See French *v.* Peters, 177 Mass. 568, referred to *supra.*

[4] For a case where the holder of the equitable title to a note was allowed to sue at law, see Nelson *v.* Piper, 213 Mass. 531.

[5] The Massachusetts requirement. If not in writing, suit may still be in name of assignor. The right to sue in assignee's name, of course, depends on the law of the forum. American Lithographic Co. *v.* Ziegler, 216 Mass. 287.

[6] Certain choses in action survive to-day under statutes which at common law did not (see, for example, Mass. Rev. Laws, ch. 171, sec. 1). But this does not necessarily make them assignable.

Examples:

A patent application is assignable.

Richardson Shoe Mach. Co. *v.* Essex Mach. Co., 207 Mass. 219.

An insurance policy is assignable.

Herman *v.* Conn. Mutual Life Ins. Co., 218 Mass. 181.

A right to surrender a life insurance policy is assignable.

Blinn *v.* Dame, 207 Mass. 159 (under general assignment).

The benefit of a bond to release attachment is assignable.

Rogers *v.* Abbot, 206 Mass. 270 (under assignment of bills receivable).

A claim against a bank for wrongfully refusing to honor a check is assignable.

Robinson *v.* Wiley, 188 Mass. 533.

A claim for injuries to the person (such as battery or personal injury resulting from negligence) or to character, reputation or feelings, (such as libel, breach of promise of marriage, alienation of affections, enticement, false imprisonment, and malicious prosecution) is not assignable in Massachusetts until after judgment (not verdict).

Rice *v.* Stone, 1 Allen 566 (personal injuries).

Stebbins *v.* Palmer, 1 Pick. 71 (breach of promise of marriage).

Delval *v.* Gagnon, 213 Mass. 203 (rule stated).

Flynn *v.* Butler, 189 Mass. 377.

Sibley *v.* Nason, 196 Mass. 125.

A mere right to litigate for fraud is not assignable.[7]

United Zinc Companies *v.* Harwood, 216 Mass. 474.

A contract to render services involving personal skill is not assignable so long as it is executory.[8]

Pike *v.* Waltham, 168 Mass. 581 (contract to build a bridge).

But see Haskell *v.* Blair, 3 Cush. 534 (assignment of benefit of contract for services of laborer).

A right of entry for breach of a condition in a deed conveying the fee is not assignable.

Rice *v.* Boston & Worcester R. R., 12 Allen 141.

A chose in action, to be assignable at law, need not be a present right of action but may be the present interest in a contract which in case of non-performance can only be reduced to possession by suit.

Taylor *v.* Lynch, 5 Gray, 49 (assignment of wages under existing contract).

Herbert *v.* Bronson, 125 Mass. 475 (assignment under non-existing contract, invalid)

Clarke *v.* Fay, 205 Mass. 228 (interest under grandfather's will, to come to assignor if he survives).

Although a lease contains a covenant not to assign, an administrator of the lessee may bring a bill to enforce agreement therein to renew.

Squire *v.* Learned, 196 Mass. 134.

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[7] But see Busiere *v.* Reilly, 189 Mass. 518, in which right to sue to rescind real estate transaction was devised by will and the devisee brought suit.

[8] But the right to receive money under such a contract is assignable. American Lithographic Co. *v.* Ziegler, 216 Mass. 287.

Recognized in equity only.

Although the jurisdiction at law is now ample for the enforcement of the rights of the assignee of a legal chose in action, the aid of equity may be invoked by the assignee of a purely equitable demand.

Kingsbury *v.* Burrill, 151 Mass. 199 (assignment of share in an expected payment of money by City of Boston).

Richardson *v.* White, 167 Mass. 58 (assignment of policy. See, as to delivery).

Brierly *v.* Equitable Aid Union,[9] 170 Mass. 218 (assignment of certificate in beneficiary association to secure a debt).

Nelson *v.* Piper, 213 Mass. 531 (equitable holder of promissory note).

At law a transfer of property to be acquired in the future is void, but in equity such a transfer creates an equitable ownership at such time as the property vests in the assignor.

Pomeroy, sec. 1288.

In Massachusetts, such a transfer operates as an executory agreement to transfer the property when acquired by the assignor. If that property is tangible, possession by assignee after acquirement by assignor gives legal title; if intangible, the legal title may be obtained in equity. In both cases it is subject to intervening adverse rights of third persons.

Kingsbury *v.* Burrill, *supra* (intangible property).

Blanchard *v.* Cooke, 144 Mass. 207 (containing a review of the law of mortgages on after-acquired personalty).

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[9] This case was brought at law. But the defendant, admitting liability to someone, summoned a claimant, and the matter was determined, as in interpleader, equitably.

Wasserman *v.* McDonnell, 190 Mass. 326 (mortgage of personalty).

But a mere possibility of income from an expected exercise of discretionary power by trustees is not assignable.

Leverett *v.* Barnwell, 214 Mass. 105.

Assignments of fractional parts of claims or funds are not recognized at law; but are good in equity as between the assignor and the assignee and are enforceable, at least when the person to pay makes no objection.

James *v.* Newton, 142 Mass. 366 (formal assignment of part interest under an uncompleted contract).

Richardson *v.* White, 167 Mass. 58 (assignments of insurance).

Endicott *v.* University of Virginia, 182 Mass. 156 (assignment of part of beneficial interest under trust fund, held binding on trustee).

But equity will lend no assistance towards perfecting a voluntary agreement to assign a chose in action absolutely or in trust, so long as it remains executory. When executed, however, equity will protect the rights of the parties.

Stone *v.* Hackett, 12 Gray 227 (gift of shares).

In equity a stranger who is recognized as an assignee of a chose in action has the same standing as the original party to the contract, though there has been no formal assignment.

Record *v.* Littlefield, 218 Mass. 483 (wife brought bill on agreement running to husband).

Orders, as assignments.

An order not having the elements of a formal assignment, drawn by one, directing another to pay a third person the whole of a certain fund or claim, due or belonging to the first, may operate as an assignment, taking effect, as to persons other than the debtor, when delivered (not when notice is given the holder of the fund).[10]

Kingman *v.* Perkins, 105 Mass. 111 (savings bank deposit).

But see White *v.* Coleman, 127 Mass. 34 (no assignment where order is on attorney to pay funds when received).

An *order* to pay less than the whole amount of the fund, however, is not an assignment *pro tanto* unless it is accepted by the person on whom it is drawn.

Dana *v.* Third National Bank, 13 Allen 445 (check).

Holbrook *v.* Payne, 151 Mass. 383 (unaccepted draft).

Florence Mining Co. *v.* Brown, 124 U. S. 385.

Some elements of the assignee's title.

In Massachusetts (*contra* in England and some other jurisdictions) the assignment of a legal chose in action is complete, so far as persons other than the debtor[11] are concerned, upon the assent of the

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[10] Of course, the debtor is protected, if, without knowledge of assignment, he pays original creditor.

[11] As between assignee and debtor it is not operative until notice and does not change rights of the debtor against the assignor existing at the time of notice. American Bridge Co. *v.* Boston, 202 Mass. 374.

assignor and the assignee. It follows that of several successive assignees, the first in point of time (not the one first notifying the debtor) has the superior claim as to third persons, unless he is estopped to set it up, and that an assignment, though the debtor has not been notified, defeats subsequent trustee process served on the assignor.

Herman *v.* Conn. Mutual Life Ins. Co. 218 Mass. 181 (Rule stated,[12] though first assignee was here estopped as against second assignee).

Thayer *v.* Daniels, 113 Mass. 129.

City Bank of New Haven *v.* Wilson, 193 Mass. 164 (payment of notes to assignor does not discharge the debtor).

Dearle *v.* Hall, 3 Russell 1; Ames Cases on Trusts 323 (The English Rule).

An assignee of a chose in action takes it subject to all equities between the parties thereto and acquires no greater rights than the assignor.[13]

Newell *v.* Hadley, 206 Mass. 335.

Pomeroy, secs. 703-706.

The liability of a lessee results from privity of contract and extends through the term; that of his assignee from privity of estate and terminates when he assigns, even though lessor has no notice.

Donaldson *v.* Strong, 195 Mass. 429.

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[12] This was an assignment of a life insurance policy. It was decided that it was immaterial as between assignor and assignee that the policy made certain requirements for the validity of assignments, not complied with here.

[13] This, of course, does not apply to negotiable paper, or (in Massachusetts) to mortgages, until they are overdue. Taylor *v.* Page, 6 Allen 86. McKeown *v.* Lacey, 200 Mass. 437, (in which assignee, without consideration, got a better title to note than assignor). *Contra* in some other states as to mortgages.

An assignment may be valid although under a fictitious name.

W. Galligan Co. *v.* Casey, 205 Mass. 26.

B. Notice.

One who acquires an interest in property with notice (either *actual* or *constructive*) of the existence in a third person of a right enforceable in equity, affecting the subject matter, takes his title subject to that right.[14]

Parker *v.* Nightingale, 6 Allen 341.

Tulk *v.* Moxhay, 11 Beavan 571; Ames, 147.

Kelley-Buckley Co. *v.* Cohen, 195 Mass. 585.

Bisbee *v.* McKay, 215 Mass. 21 (notice to one trustee, is notice to all where they are volunteers).

Conversely, one who acquires a legal interest in property as a *bona fide* purchaser for value, without actual or constructive notice of the existence of a prior equitable claim, is not ordinarily interfered with by a court of equity.

Pomeroy, secs. 737-746.

In America, under recording acts, it is also true that a grantee gets a good legal title to an interest in real estate if he acquires it without actual or constructive notice[15] of a prior deed by which his grantor

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[14] Under the Massachusetts Land Court Act, however, a certificate of title setting forth ownership and incumbrances is conclusive evidence of matters therein contained. *Quaere*; Does actual notice have any effect? Mass. Rev. Laws, ch. 128, sec. 46.

[15] The effect is, of course, to make the recording of deeds the means of asserting and preserving one's title against such persons as do not have actual notice of it.

has conveyed that interest to another. The former grantee is then estopped to claim against him.

See Mass. Rev. Laws, ch. 127, sec. 4.

But this principle does not apply to purchasers of personalty.

Bisbee *v.* McKay, 215 Mass. 21 (purchaser of shares in a realty trust).

Actual Notice (in England and Massachusetts),[16] while it imports less than the positive knowledge that would come from having been an eye-witness to certain facts, is such notice as convinces its recipient of the truth of the facts in question. It is more than mere rumor of facts that would reasonably put a purchaser on inquiry.

Evans *v.* Wall, 162 Mass. 478 (rule stated).

Lamb *v.* Pierce, 113 Mass. 72 (actual notice of unrecorded deed, under recording statutes).

Curtis *v.* Mundy, 3 Met. 405.[17]

George *v.* Kent, 7 Allen 16 (description in deed gives actual notice of abutting owners).

Hughes *v.* Williams, 218 Mass. 448 (knowledge of attaching creditor that debtor has given an unrecorded deed).

Constructive Notice is the legal presumption that one has notice. This presumption may arise (1)

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[16] In some other jurisdictions *actual* knowledge is said to include "knowledge of such facts as would put a prudent man on inquiry." Brinkman *v.* Jones, 44 Wisc. 498; Kirsch *v.* Tozier, 143 N. Y. 390.

[17] "Information of the giving of a deed, brought home to a party with as much authority as the fact of the marriage or death of a friend in the newspaper" was held to be actual notice.

from evidence so strong as not safely to be ignored; (2) by virtue of statutes, such as the recording acts of the several states.

Story's Equity, sec. 399.

Colby *v.* Shute, 219 Mass. 213 (notice from publication in insolvency proceedings).

Notice presumed from evidence. Open possession of land is constructive notice[18] that the possessor claims some kind of interest. But as (in Massachusetts) actual notice is required to charge one with knowledge of legal interests greater than that of a lessee for less than seven years, possession is only notice that the possessor may have such an interest as tenant.

Cunningham *v.* Pattee, 99 Mass. 248 (tenant).[19]

Under recording acts. Recording deeds, under American statutes, gives constructive notice of their contents to subsequent purchasers.

Bates *v.* Norcross, 14 Pick. 224 (but no notice to lawful owner, from deed of one with no title).

To effect constructive notice in this form, however, all statutory pre-requisites must be complied with.

Blood *v.* Blood, 23 Pick. 80 (unacknowledged deed not notice, though recorded).

One is put upon his inquiry to learn the truth of

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[18] It falls short, however, of the actual notice required in the case of unrecorded deeds. Mara *v.* Pierce, 9 Gray 306.

[19] The constructive notice rule is here stated to be that "notice sufficient to make inquiry a duty is notice of all that by reasonable inquiry would have been ascertained."

recitals in deeds to him or in deeds in his chain of title.

Smith *v.* Burgess, 133 Mass. 511 (assignee of mortgage has constructive notice from word "trustee" in mortgage).

In order to be affected by a prior unrecorded deed from one's grantor to a third person, one must have *actual* notice of that deed, in Massachusetts and some other jurisdictions.

Mass. Rev. Laws, ch. 127, sec. 4 (and cases under "Actual Notice" *supra*).

Hughes *v.* Williams, 218 Mass. 448 (actual notice to attaching creditor, of outstanding deed, discussed).

One who acquires notice of an unrecorded instrument between making his first payment for property and obtaining his deed, takes with notice.

Wentz *v.* Pastene, 209 Mass. 359 (unrecorded lease for more than seven years).

Lis pendens is usually referred to the equitable doctrine of notice. This charges with notice one who, pending a suit to reach certain property, acquires an interest therein, though he pays a valuable consideration and has no actual notice. The matter is now usually governed by statutes, requiring either actual notice or (as a means of affording constructive notice) the filing of a memorandum of the pending suit in the registry of deeds where instruments affecting the land should be recorded.

Mass. Rev. Laws, ch. 134, sec. 12.

C. Estoppel.

Estoppel is the preclusion of a person to contradict in court that which has been admitted or deter-

mined to be a fact under circumstances of solemnity (as by a record or by a deed), or to contradict a representation of fact which he has induced another to believe to be true and to act upon to his prejudice (estoppel *in pais*).

Legal estoppel is the designation given to —

1. Estoppel by Record;
2. Estoppel by Deed;
3. Certain Estoppels *in Pais*.

1. *Estoppel by Record.*

A record of a court of law having jurisdiction[20] of the parties to the controversy imports verity so that it is an effectual bar to further dispute on the identical subject matter by the parties[21] to it or by their privies. This conclusiveness is referred to as *res judicata*. It follows only upon the judgment or decree. A verdict or finding is insufficient.

Bigelow on Estoppel, Chapter II.

Old Dominion Copper Co. *v.* Bigelow, 203 Mass. 159, at page 217.

Saco Brick Co. *v.* J. P. Eustis Mfg. Co., 207 Mass. 312.

Haskell *v.* Cunningham, 221 Mass. 49 (clerk of courts may not testify in contradiction of his records).

A judgment is conclusive by way of estoppel

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[20] A judgment rendered upon constructive service may be a good judgment *in personam* in that state, though void when sued on outside the state. Pennoyer *v.* Neff, 95 U. S. 714; Bigelow *v.* Old Dominion Cop. Co., 225 U. S. 111.

[21] There is no estoppel against a suit between the same persons, one of whom sues or is sued in a different capacity. McCarthy *v.* Wood Lumber Co., 219 Mass. 566.

only as to those facts which were necessarily included in it and without the existence and proof of which such a verdict and judgment could not have been rendered.[22]

Flynn *v.* Howard, 218 Mass. 245 (final decree in equity may be bar to suit at law).

Fairbanks *v.* McDonald, 219 Mass. 291 (damages for "loss already sustained," no bar to injunction against future damage).

Lima *v.* Campbell, 219 Mass. 253.

Burlen *v.* Shannan, 99 Mass. 200.

Inst. for Savings, etc. *v.* Puffer, 201 Mass. 41.

Therefore, there can be no estoppel arising out of a judgment[23] unless the same parties, or their predecessors in title, have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties.

Bigelow *v.* Old Dominion Copper Co., 225 U. S. 111.

Mere recovery of judgment is no bar to another action against a different party (as a joint tort feaser) or to an action against the same person if he has given different obligations in respect of what is in substance the same debt.

Vann *v.* Burr, 151 Mass. 386.

Frost *v.* Thompson, 219 Mass. 360.

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[22] The dismissal of a bill for want of prosecution is therefore no bar to a further suit. Conant *v.* Boston Chamber of Commerce, 201 Mass. 479.

[23] But in the case of a judgment *in rem*, the whole world is estopped. McCarthy *v.* Wood Lumber Co., 219 Mass. 566.

Bigelow *v.* Old Dominion Copper Co., 225 U. S. 111.

Judgment for the defendants in a suit on a note against three partners raises an estoppel to sue any one of them on the note.

Rogers *v.* Shea, 219 Mass. 416.

But a judgment against defendant trustees in a suit at law does not estop the plaintiff from proceeding also in equity against the trust estate.

Frost *v.* Thompson, 219 Mass. 360.

Nor is one estopped from setting up the truth by reason of having taken an inconsistent position in earlier litigation in which he was defeated.

Jennings *v.* Wall, 217 Mass. 278.

Athol Sav. Bank *v.* Bennett, 203 Mass. 480.

But see Gardner *v.* Denison, 217 Mass. 492 (father suing as next friend cannot later sue in his own name).

A judgment is an absolute merger of a debt by simple contract, so that the judgment creditor is thereafter estopped to maintain another suit on the original promise. But this doctrine operates only between original parties and their privies, and is not a bar in favor of strangers.

Frost *v.* Thompson, 219 Mass. 360 (and cases cited).

2. *Estoppel by Deed.*

An estoppel by deed is a preclusion of the competent parties to a valid sealed contract, and their privies, to deny its force and effect by any evidence of inferior solemnity.

Bigelow on Estoppel, ch. VII.

Watson *v.* Watson, 128 Mass. 152.

Dooley *v.* Wolcott, 4 Allen 406.

A void instrument does not work estoppel.

Mason *v.* Mason, 140 Mass. 63 (conveyance of dower by a wife in husband's lifetime).

N. Y., N. H. & H. R. R. *v.* York & Whitney Co., 215 Mass. 36 (contract invalid under interstate commerce laws).

Deans *v.* Eldredge, 217 Mass. 583 (void deed).

The estoppel may be against denying recitals or covenants therein.

Cutler *v.* Dickinson, 8 Pick. 386 (recital in probate bond that principal was appointed estops surety from denial).

Johnson *v.* Thompson, 129 Mass. 398 (recital in deed that property subject to mortgage. Grantee estopped).

Federal Trust Co. *v.* Bristol Co. St. R'way, 218 Mass. 63.

But an estoppel may be a bar to another estoppel.

Platt *v.* Squire, 12 Met. 494.

Title by estoppel arises where a grantor without title gives a deed with warranty[24] and subsequently acquires the ownership of the property named therein. This inures to the benefit of the grantee.

Somes *v.* Skinner, 3 Pick. 52.

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[24] As to estoppel by quitclaim deed, see Mass. Land Court Decisions 9, and cases therein cited, and Howe *v.* Howe, 199 Mass. 598.

White *v.* Patten, 24 Pick. 324.

Cressey *v.* Cressey, 215 Mass. 65 (estoppel from sheriff's deed of property of which debtor owned undivided share, provided that portion is subsequently set off to him).

But there is no title by estoppel where one who has conveyed by metes and bounds, with one measurement short, subsequently acquires the adjoining property.

Van Ness *v.* Boiney, 214 Mass. 340.

Nor is there any estoppel from the covenants of a void deed.

Deans *v.* Eldredge, 217 Mass. 583.

Release of dower by a woman during coverture also operates by way of estoppel, as dower itself arises only after the husband's death.

Stearns *v.* Swift, 8 Pick. 532.

Wing *v.* Deans, 214 Mass. 546 (liability of feme covert on her covenants was formerly only by way of estoppel).[25]

3. *Estoppel in Pais*[26] —

This may be:

a. From contract; or

b. Equitable estoppel.

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[25] But to be estopped, she must have joined in the operative words. One who erroneously joined in a deed simply releasing dower was not estopped to claim the property as her own. Pierce *v.* Chace, 108 Mass. 254. But see Snow *v.* Hutchins, 160 Mass. 111, where a woman who thus signed was estopped by other facts.

[26] See foot-note to Stowe *v.* United States, 19 Wall. 13.

a. *Estoppel by Contract* arises where some fact at the basis of the contract is treated by it as specifically settled (as, for example, the capacity in which one party assumes to act). In this class, also, is the estoppel from indorsement on commercial paper, or in the form of a preclusion of a lessee to deny landlord's title.

Granger *v.* Parker, 137 Mass. 228 (lease).

Dooley *v.* Cheshire Glass Co., 15 Gray 494 (corporation estopped to deny validity of its incorporation).

Daniels *v.* Tearney, 102 U. S. 415 (one acting under unconstitutional law may not set up its unconstitutionality).

b. *Equitable Estoppel* (or Estoppel by Misrepresentation).[27]

Where one by his words or conduct wilfully (or negligently) causes another to believe the existence of a certain state of things and induces (or, under same circumstances, knowingly allows) him to act on the belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things as existing at the same time.

Bigelow on Estoppel, page 557 (5th edition).

Jennings *v.* Wall, 217 Mass. 278.

Gray *v.* Bartlett, 20 Pick. 186.

Stimson *v.* Whitney, 130 Mass. 591 (estoppel to deny partnership, arising from failure to indicate termination of relationship).

N. E. Structural Co. *v.* Everett Distilling Co., 189 Mass. 145 (estoppel by plan).

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[27] This doctrine is only to be applied "when to refuse it would be manifestly inequitable." Deans *v.* Eldredge, 217 Mass. 583 (no estoppel from covenants of void deed).

Downey *v.* Hood, 203 Mass. 4 (estoppel by plan).

Lilley *v.* Fifty Associates, 101 Mass. 432 (estoppel, from dealings, to claim payment of rent in "Russia Old Sables Iron").

Richards *v.* Keyes, 195 Mass. 184 (cestui estopped to complain of trustee's act he has requested).

In order to constitute such estoppel, it must appear that the facts were known to the party against whom the estoppel is urged, that his acts or representations were intended to be acted upon by the party later urging the estoppel, and that they were so acted upon by him in ignorance of the truth, to his prejudice.[28]

Newton Centre Trust Co. *v.* Stuart,[29] 201 Mass. 288 (as to intent that representation be acted on).

Stiff *v.* Ashton, 155 Mass. 130 (one stating to an officer that goods belonged to another was not estopped to deny his own title, unless he had reason to suppose the statement might induce the officer to attach).

Tyler *v.* Odd Fellows', etc., 145 Mass. 134 (as to estoppel by "receipt in full").

Plymouth *v.* Wareham, 126 Mass. 475 (no estoppel without real damage).

Westlake *v.* Dunn, 184 Mass. 260 (no estop-

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[28] The earlier Massachusetts cases spoke of the necessity of "intent to deceive"; the later cases say that this intent may be inferred from the fact that one who knows or has reason to know the truth has spoken falsely.

[29] This case should be carefully distinguished from Central Nat'l Bank *v.* Copp, 184 Mass. 328.

pel where deed fraudulently delivered by agent).[30]

Lincoln *v.* Gay, 164 Mass. 537 (no estoppel to recover damages from dressmaker who, without being ordered by plaintiff, made up dress goods wrong side out).

Hinchley *v.* Greaney, 118 Mass. 595 (one asserting property unincumbered, estopped to assert mechanic's lien).

Bernard *v.* Adams Express Co., 205 Mass. 254 (one asserting value of express parcel estopped, after loss, to claim more, notwithstanding Interstate Commerce Law).

A negligent failure to tell the truth may constitute such a representation as to estop one to assert a title adverse to one who has been induced by the representation to acquire an interest in the property.

Tracy *v.* Lincoln, 145 Mass. 357 (wife present when husband mortgaged her property as his own estopped to claim title against mortgagee).

Nickerson *v.* Mass. Title Ins. Co., 178 Mass. 308 (an attorney employed to examine a title failed to report a mortgage held by the attorney).

Snow *v.* Hutchins, 160 Mass. 111 (woman who signed to release dower in land owned by herself, title of which husband was warranting in deed, estopped to claim land).

Smyth *v.* Sprague, 149 Mass. 310 (holder of unrecorded deed estopped to claim property as against creditor, but not as against

[30] Compare Phelps *v.* Sullivan, 140 Mass. 36 (where mortgagee was estopped to deny assignment by agent).

assignee in insolvency[31]

Cutter *v.* Cutter, 215 Mass. 94 (party to partition proceeding making no claim to barn estopped to deny that barn is part of realty, after assenting to decree).

But in a case where one's act has not induced or may not reasonably be expected to induce the person later seeking to set up the estoppel, to act to his detriment, the act (whether of speech or silence) may be no such breach of duty as will give rise to estoppel.

Newton Centre Trust Co. *v.* Stuart, 201 Mass. 288.

Lincoln *v.* Gay, 164 Mass. 537.

Huntress *v.* Hanley, 195 Mass. 236 (no duty on owner of property to assert title at once upon hearing that another *has mortgaged* it as his).

Goodenough *v.* Labrie, 206 Mass. 599 (agreement to assume and pay mortgage).

Cole *v.* N. E. Trust Co., 200 Mass. 594.

So a promise, without consideration, to pay an account for services made after the account is contracted, although admissible as evidence, does not estop one from denying liability or contesting the amount of the claim.

Conant *v.* Evans, 202 Mass. 34 (a doctor's bill. Defendant had written letters promising to pay).

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[31] Our statutes requiring deeds to be recorded result in the estoppel of the holder of an unrecorded deed as against one who subsequently takes title without actual notice.

Entrusting another with possession of chattels is not holding him out as owner and creates no estoppel if he undertakes to sell.

Rogers *v.* Dutton, 182 Mass. 187.

Kershaw *v.* Merritt, 194 Mass. 113 (husband and wife).

But entrusting another with the tangible evidence of a chose in action may lead to estoppel to claim from one who acquires from him.

Herman *v.* Conn. Mutual Life Ins. Co., 218 Mass. 181 (insurance policy).

Russell *v.* Am. Bell Tel. Co., 180 Mass. 467 (stock certificate).

Title by estoppel once thus acquired may pass by conveyance to anyone, whether with or without knowledge.

Nickerson *v.* Mass. Title Ins. Co., 178 Mass. 308.

Equitable estoppel is usually recognized at law and resort to equity is ordinarily unnecessary.

Dickerson *v.* Colgrove, 100 U. S. 578 (rule stated).

Drexel *v.* Berney, 122 U. S. 241.

Election of Remedies.

When a party has two alternative and inconsistent rights, he may be estopped by his election between them, provided he makes it deliberately and uninfluenced by accident or mistake.

Stevens *v.* Pierce, 151 Mass. 207.

Holman *v.* Updike, 208 Mass. 466.

Debbins *v.* Foster, 219 Mass. 370 (election to hold as mortgagee in possession).

There is no election, however, where the choice is not made deliberately, or is the result of accident or mistake as to the facts.

Snow *v.* Alley, 156 Mass. 193.
Moore *v.* Sanford, 151 Mass. 285.
Peters *v.* Ballestier, 3 Pick. 495.

Where one brings in the same jurisdiction two suits for the same cause of action, an election of remedies may be required before trial.[32]

Sanford *v.* Soule Piano & Organ Inv. Co., 164 Mass. 85 (suit at law; then one to reach and apply in equity. Held bill should be dismissed unless lawsuit is discontinued).

But the rule of election does not necessarily prevent the simultaneous employment of different remedies not mutually repugnant, looking towards the satisfaction of a single claim.

Connihan *v.* Thompson, 111 Mass. 270.
Corbett *v.* B. & M. R. R., 219 Mass. 351. (action under state and federal employers' liability acts, tried together).
Frost *v.* Thompson, 219 Mass. 360 (judgment against trustees at law is not an election so as to prevent recovery in equity against the trust estate).

Waiver.

Some forms of estoppel are more famil-

[32] See Turnquist *v.* Hannon, 219 Mass. 560 for discussion of election by beginning proceedings under Workingmen's Compensation law.

iarly known as waiver, and commonly arise in contracts of insurance.

N. Y. Life Ins. Co. *v.* Eggleston, 96 U. S. 572.

Little *v.* Phoenix Ins. Co., 123 Mass. 380 (waiver of preliminary statement).

Eliot Five Cents Savings Bank *v.* Commercial Union Ass'n Co., 142 Mass. 142 (waiver of defects in proof of loss).

Canton Co-operative Bank *v.* American Central Ins. Co., 219 Mass. 132 (waiver of right to require arbitration).

Fall River *v.* Aetna Insurance Company, 219 Mass. 454 (denial of all liability may amount to waiver of arbitration right).

D. Equitable Conversion.

"Equitable conversion is that equitable or implied change in the nature of property by which, for certain purposes in equity, real estate is considered as personal and personal estate as real, and transmissible and descendible as such."[33] It is based on the maxim that equity regards that as done which ought to be done.

Pomeroy's Equity, sec. 1159 et seq.

Being an equitable doctrine, conversion is enforced only in courts of equity, except where, as it affects the devolution of property, it is recognized in probate proceedings. The doctrine is principally important in America to-day in determining rights

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[33] "The effect is that though there is no actual change in the nature of the property all the legitimate consequences of such a change will result so far as persons claiming under the instrument or its author are concerned. The effects of conversion extend only to those persons, however. See Pomeroy, sec. 1166.

between heirs and personal representatives. The respective rights of widows, legatees, and devisees, may also depend on the doctrine.

See cases *infra*.

Conversion occurs when an intention is absolutely expressed in a will or other instrument that land shall be sold and turned into money, or that money shall be expended in the purchase of land.

Holland *v.* Cruft, 3 Gray 162, at 180.

Hammond *v.* Putnam, 110 Mass. 232.

Perkins *v.* Coughlin, 148 Mass. 30.

Hovey *v.* Dary, 154 Mass. 7.

Thissell *v.* Schillinger, 186 Mass. 180.

It occurs immediately on the death of a testator, if in a will, or on the execution of an instrument *inter vivos*.

Hammond *v.* Putnam, 110 Mass. 232 (will).

Pomeroy, sec. 1162.

It occurs even though the person charged with making the change has not done so.

Lechmere *v.* Earl of Carlisle, 3 P. Wms. 215.

It is immediate, though the person charged with the duty has power to delay the change.

Morris *v.* Griffiths, 26 Ch. Div. 601.

Mellon *v.* Reed, 123 Penn. 1 (express power to delay).

It is immediate, though the change is to be made only on the happening of an event certain.

Asche *v.* Asche, 113 N. Y. 232.

But it occurs only when the event takes place, if dependent on an event uncertain.

Peter *v.* Beverly, 10 Peters 532.

Duration of Equitable Character.

If the purpose for which conversion is ordered fails, in whole or part, the property not converted remains as if no conversion had been ordered (or in the hands of a trustee may give rise to a resulting trust).

Ackroyd *v.* Smithson, 1 Brown's Ch. 503.

Pomeroy, sec. 1169 et seq.

But if land is ordered sold, the proceeds to be mixed in a common fund for payment of debts and legacies, there is conversion as to the whole and the surplus is personalty.

Perkins *v.* Coughlin, 148 Mass. 30.

Hammond *v.* Putnam, 110 Mass. 232.

Where land is sold under an order of court for a specific purpose, the surplus money as between the heirs and next of kin is considered as land. Until it reaches a person absolutely entitled to it, it is considered realty and descends as such.

Appeal of Wentz, 126 Penn. 541.

Mass. Rev. Laws, ch. 148, sec. 9 (provides that surplus of sales of deceased person's land shall be considered real property in the final accounting).

Where land held in trust is taken by eminent domain, the proceeds are in like manner held as land

until they reach the hands of the person absolutely entitled thereto.

Gibson *v.* Cooke, 1 Met. 75.

Davis *v.* Badlam, 165 Mass. 248.

Simonds *v.* Simonds, 112 Mass. 157.

Who is "a person absolutely entitled thereto?"

1. The cestui is not.

   Hovey *v.* Dary, 154 Mass. 7.

2. In some jurisdictions infants and lunatics are not.

   In re Barker, 17 Ch. Div. 241.

   Horton *v.* McCoy, 47 N. Y. 21.

   Contra: Emerson *v.* Cutler, 14 Pick. 108 (on the ground that the act of the guardian is the act of the minor).

   Holland *v.* Cruft, 3 Gray 162 (explaining Emerson *v.* Cutler, and decided before the statute of 1836, now R. L., ch. 148, sec. 9).

In some cases the proceeds of insurance policies in trust estates, not expended for purposes of the trust, will be regarded in equity as real property belonging to the owner of the reversion.

Hawes *v.* Lothrop, 38 Cal. 493.

Where land is converted by a will or otherwise, all parties in interest may, of course, by some unequivocal act, elect to take it as realty. That is called *reconversion.*

Mellon *v.* Reed, 123 Penn. 1.

Trask *v.* Sturges, 170 N. Y. 482.

Pomeroy, sec. 1175 et seq.

The Statute of Frauds.

The doctrine of conversion was held to permit the transfer by parol, notwithstanding the Statute of Frauds, of a man's interest under a clause in a will requiring land to be converted into money, in

Mellon *v.* Reed, 123 Penn. 1. (Oral exchange of his interest for a cow, held to be a mere assignment of a chose in action, even though subsequent reconversion by other heirs).

In determining inheritance taxes, the doctrine is not to be invoked, so as to compel the executor to bring personalty from another jurisdiction to free from incumbrance real estate in Massachusetts and thereby increase the tax.

McCurdy *v.* McCurdy, 197 Mass. 248.

But see In re Shoenberger, 221 Penn. 112.

Conversion in Land Contracts.

After the making of a contract for the sale of land or other property as to which specific performance may be had, equity considers the agreed vendee the owner of the property and the agreed vendor the owner of the purchase money.[34]

Pomeroy, secs. 1161-1166.

The agreed vendor, before conveyance is made, is sometimes called a trustee for the vendee, although the analogy between agreed vendor and mortgagee seems closer.

[34] In case of the failure of the agreed vendee to complete the purchase, it is sometimes a vexing question as to when the relation ends. See decree foreclosing vendee's rights in Button *v.* Schroyer, 5 Wis. 598; Ames 225.

Felch *v.* Hooper, 119 Mass. 52 (likened to trustee).

Merrill *v.* Beckwith, 163 Mass. 503; Ames 19.

Rayner *v.* Preston, L. R. 18 Ch. Div. 1; Ames 229.

Button *v.* Schroyer, 5 Wisc. 598; Ames 225.

Ames 240, *note* (relation analagous to mortgagor and mortgagee).

The validity of a contract is a requisite for conversion.

Thomas *v.* Howell, 34 Ch. Div. 166; Ames 196 (none where agreed vendor has no title).

Blew *v.* McClelland, 29 Mo. 304; Ames 237 (none in oral contract to convey land).

Curre *v.* Bowyer, 5 Beavan 6; Ames 196 (if contract valid, but specific performance impossible through laches, consequences of conversion are present).

Effect of Death of Party.

If an agreed vendor dies,[35] his legal title descends to his heirs, but they, being volunteers, hold it subject to the duty to convey to the agreed vendee, in which case the purchase money goes to the agreed vendor's personal representative. The latter may even compel specific performance by the heirs and agreed vendee, although neither of them desires it.[36]

[35] In Massachusetts, by statute, the executor or administrator of the agreed vendor may be ordered to make the conveyance. Mass. Rev. Laws, ch. 148, sec. 1.

[36] Thus, if A agree to convey to B and die before doing so, there may be these actions:— (1) B *v.* A's heirs (or devisees) and A's administrator (or executor); (2) A's administrator (or executor) *v.* B and A's heirs (or devisees); (3) A's heirs (or devisees *v.* B and A's administrator or executor. Decree would be that A's heirs (or devisees) convey to B upon receipt by A's administrator (or executor) of purchase price.

Bubb's Case, Freeman Ch. 38; Ames 194.

If an agreed vendee dies, his heirs or devisees are necessary parties to a suit for specific performance. If they seek to compel conveyance, the suit should be against the agreed vendor for the conveyance of the land, and the agreed vendee's administrator for the payment of the purchase money.[37]

Conversion takes place though a valid contract is rescinded after the death of the agreed vendee. His heirs are then entitled to the purchase money which would have been paid for the land.

Matthews *v.* Gadd, 5 So. Australia 129; Ames 193.

Green *v.* Smith, 1 Atkyns 572; Ames 193. (Vendor's title defective; no conversion).

Where a man has made a contract to sell real estate, and then makes a will devising it, the devisee will be entitled to the proceeds of the sale, because that is presumed to be the intention of the testator; but where, after having given the property by will, the testator agrees to sell it and the sale is afterward made, the interest of the devisee is taken away.

Mayer *v.* Gowland, 2 Dickens 563; Ames 195.

Townley *v.* Bidwell, 14 Vesey 591; Ames 199.

Effect upon Dower and Curtesy.

Where one *before marriage* has agreed to sell land, the spouse is held in equity to have no dower or curtesy in it (as the agreed vendor is but a trustee of the legal title).

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[37] Thus, if A agree to convey to B and B die before receiving conveyance, there may be these actions:— (1) B's heirs (or devisees) *v.* A and B's administrator (or executor); (2) A *v.* B's heirs (or devisees) and B's administrator (or executor); (3) B's administrator (or executor) *v.* A and B's heirs (or devisees).

Dooley *v.* Merrill,[38] 216 Mass. 500 (in which woman was vendor).

Dean *v.* Mitchell, 4 J. J. Marshall (Ky.) 451;

Ames 204 (in which man was vendor).

When the agreed vendee dies before obtaining a conveyance, his widow ordinarily has no dower, because a widow has no dower in the equitable estate of her husband.

Lobdell *v.* Hayes, 4 Allen 187 (no dower where contract wholly executory at his death).

But, in Massachusetts, the widow of an agreed vendee has been held to have dower in a case where the purchase money was paid during the lifetime of her husband. This was the result of the construction of a statute (now somewhat modified).

Reed *v.* Whitney, 7 Gray 533 (discussion of principle).

Effect of Loss before Conveyance.

The agreed vendor may enjoin the vendee against waste which affects the security, and the vendee may likewise enjoin the vendor against waste.

Crockford *v.* Alexander, 15 Vesey 138; Ames 221 (vendee's waste).

Clarke *v.* Ramuz, L. R. 1891, 2 Q. B. 456; Ames 222 (vendor's waste).

If the buildings are destroyed by fire or other casualty before the title is passed, in most jurisdictions

[38] In Dooley *v.* Merrill, however, the court enjoined the husband from claiming curtesy.

the loss falls upon the agreed vendee as the equitable owner.

Paine v. Meller, 6 Vesey 349; Ames 227.

And this is true in some jurisdictions, although the vendor is in possession and the time for passing title has not arrived.

Brewer v. Herbert, 30 Md. 301.

Contra: Goldman v. Rosenberg, 116 N. Y. 78.

Where the rule in *Paine v. Meller* applies, if the vendor recovers insurance he ordinarily does so to the use of the vendee.

Skinner v. Houghton, 92 Md. 68.

Contra: Rayner v. Preston, L. R. 18 Ch. Div. 1; Ames 229.

In Massachusetts, the rule in *Paine v. Meller* is not law, unless a contract for sale plainly implies that the vendee takes the chance that the building may be burned. A condition that the buildings shall exist is implied, and so the loss is on the vendor.[39]

Hawkes v. Kehoe, 193 Mass. 419.

Thompson v. Gould, 20 Pick. 134; Ames 234.

Wells *v.* Calnan, 107 Mass. 514.

Allyn v. Allyn, 154 Mass. 570 (where plainly implied that vendee took the chance).

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[39] This is sometimes said to be the legal rather than the equitable rule, but it appears to prevail in equity in Massachusetts and the following other jurisdictions:— New Hampshire, Maine, Oregon and New York. Cases in all these except New York have held vendor liable even though vendee in possession.
For a discussion of this rule in a satirical vein, see "The Lawyers' Ignorance of the Law" in the Outlook for September 5, 1908.

CHAPTER VI.

SOME SPECIFIC GROUNDS FOR RELIEF

A. ACCIDENT.

B. MISTAKE.

1. Excusable Ignorance of a Material Matter

a. Mistakes of Law.

b. Mistakes of Fact.

2. Mistakes in Written Instruments.

3. Relief Generally.

C. FRAUD.

1. Jurisdiction.

2. Constructive Fraud.

a. Apparent from the Bargain Itself.

b. Presumed from the Circumstances of the Parties.

c. Transactions Injurious to Third Persons — Fraudulent Conveyances.

d. Transactions Void as Against Public Policy.

3. Remedies in Fraud.

a. Remedies at Law.

b. Remedies in Equity.

A. Accident.

Accident, as the term is used in equity, is an unforeseen and unexpected event occurring to a party injuriously affected by it, and not attributable to his neglect or misconduct,[1] which but for the relief in equity would result in an undue advantage to some other party.

Equity has from earliest times relieved against the consequences of such accidents.

Savannah Nat'l Bank *v.* Haskins, 101 Mass. 370.

Pomeroy, sec. 823 (see, for a full definition).

In the case of lost instruments under seal, there was early jurisdiction because of the impossibility of making *profert* at law, and, in the case of unsealed instruments, because of the impossibility of complying with the legal right of the person paying to possess the note paid. In both cases equity required an indemnity bond from the plaintiff, to protect the defendant from the effects of an appearance of the instrument in the hands of a *bona fide* holder for value.

Savannah Nat'l Bank *v.* Haskins, 101 Mass 370.

Patton *v.* Kimball, 70 Ill. 72 (bond).

In Massachusetts, before the courts had general equity jurisdiction, it was well settled (either as a rule of practice or of law) that recovery might be had at law on lost instruments provided the plaintiff, if necessary to the protection of the defendant, gave an indemnity bond.

Fales *v.* Russell, 16 Pick. 315 (bond).
Munroe *v.* Weir, 177 Mass. 301 (no bond required).

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[1] Cases, referred by some writers to this general head of equity jurisdiction, seem to violate this requirement of the definition.

But such recovery is not allowed *at law* in Massachusetts where a bond to indemnify would not adequately protect the defendant.

Tuttle *v.* Standish, 4 Allen 481; (where defendant was an indorser; no recovery at law, though perhaps in equity).

Savannah Nat'l Bank *v.* Haskins, 101 Mass. 370 (recovery in equity).

Tower *v.* Appleton Bank, 3 Allen 387 (destroyed bank notes).

Hinsdale *v.* Bank of Orange, 6 Wendell 678 (discussion on lost bank notes).

Among the other accidents[2] from the results of which equity may relieve, are

1. The defective execution of powers, where the defect is a formal one.

Coates *v.* Lunt, 210 Mass. 314.

2. Those that so prevent a defendant in an action at law, without any negligence on his part, or the part of his attorney, from setting up a good defense on the merits, that a judgment is rendered against him.

See Chapter VIII, Part B, *infra*.

3. Certain kinds of forfeitures.[3]

Relief from pecuniary forfeitures is a settled branch of equity. Relief from other kinds of forfeitures *may* be had in equity.

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[2] See generally Pomeroy, secs. 833-836; Eaton, chap. XI.

[3] Some writers refer the whole subject of penalties and forfeitures, as applied to mortgages, etc., to the head of Accident. This is probably erroneous so far as *pecuniary* penalties are concerned.

Mactier *v.* Osborne, 146 Mass. 399 (accidental breach of covenant in lease).

Lilley *v.* Fifty Associates, 101 Mass. 432.

4. Certain contingencies arising in the settlement of estates, as payments made in good faith by executors where later there proves to be a deficiency of assets.

Story's Equity, sec. 90 *et seq.*

5. Alteration or mutilation of written instruments which would render them void or useless at law.

Nickerson *v.* Sweet, 135 Mass. 514 (innocent change in interest rate in note).

Niles *v.* Graham, 181 Mass. 41 (mutilation of patent assignment).

But the equitable doctrine of accident may not be invoked to relieve one from the performance of a duty imposed by express agreement of the parties (except in the matter of relief from penalties in bonds).

Milldam Foundry *v.* Hovey, 21 Pick. 417, at 441 (rule stated).

Davis *v.* Alden, 2 Gray 309 (agreement to pay rent, with no provision against fire).

Adams *v.* Nichols, 19 Pick. 275 (contract to build house; fire).

The relief will not be granted against one equally entitled to equitable protection, as, for example, a *bona fide* purchaser without notice.

Pomeroy, sec. 829.

B. Mistake.

Mistake, as a ground for affirmative relief in equity, is

(1) Excusable ignorance of some material matter

of law or fact by which a party has been led to part with some right or to assume some obligation, or

(2) An error or omission in a written instrument whereby it fails to express the actual agreement of the parties.[4]

1. *Excusable Ignorance.*

(a) *Mistakes of Law.*[5]

A mere mistake as to general law by one party to a contract ordinarily affords, in the absence of fraud, no ground for relief at law or in equity.

Utermehle *v.* Norment, 197 U. S. 40.

Taylor *v.* Buttrick, 165 Mass. 547 (relief denied where ignorance of legal effect of voluntary settlement).

Hunt *v.* Rousmaniere's Admr., 1 Peters 1; (creditor took power of attorney as security. Debtor died. No relief. He got security he intended).

But a clearly established *mutual* mistake of law "does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases." In such cases the ground for relief is not that there has been a mistake of law, but that *by means of a mistake of law* the clear intent of the parties has failed of expression,[6] and that but for equitable relief there would result the unjust enrichment of one at the expense of the other.

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[4] *Accident* refers to an event external to the party injuriously affected and subsequent to some obligation; *mistake* is subjective, an erroneous mental condition at or before the incurring of an obligation.

[5] Certain mistakes of law are considered mistakes of fact and remediable as such. See *infra*.

[6] See Mistakes in written instruments, *infra*.

Reggio *v.* Warren, 207 Mass. 525 (full discussion by Sheldon, J.).

Griswold *v.* Hazard, 141 U. S. 260, (injunction against suit on a *ne exeat* bond conditioned that the principal should "abide and perform" decrees of court; obligation thereunder to pay was misunderstood).

Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45.

So mistakes as to titles have been corrected, the word "heirs" substituted for "successors," the omission of words of inheritance supplied, a deed reformed to bind a partnership rather than an individual member, and a mortgage in the name of an agent rectified by inserting a principal's name.[7]

J. P. Eustis Mfg. Co. *v.* Saco Brick Co., 198 Mass. 212 (and cases there collected).

Mistake of law *by one party* to a contract, resulting from "undue influence" of, or from "undue confidence" in, the other party, may be ground for relief as fraud.

Eaton's Equity, sec. 112.

See Constructive Fraud, *infra*.

Money paid under mistake of law probably cannot, in the absence of fraud, be recovered at law or in equity.[8] It may, however, where paid under a mistake of fact.

Haven *v.* Foster, 9 Pick. 112 (mistake of foreign law, a fact).

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[7] In this class of cases, the mistake is sometimes one of law and sometimes a mistake of the scrivener. See Mistakes in Written Instruments, *infra*.

[8] But see the reasoning of Sheldon, J., in Reggio *v.* Warren, 207 Mass. 525, regarding "unjust enrichment."

Gould *v.* Emerson, 160 Mass. 438 (mistake of fact; equity).

(b) *Mistakes of Fact.*

Mutual[9] mistake (not the result of a neglect of plaintiff's duty) as to a fundamental fact, past or present[10] (such as the existence or the identity of the subject matter), is such mistake of fact as to be the ground for relief in equity from the consequences of an agreement based thereon.

Hammond *v.* Allen, 11 Peters 63 (subject matter had ceased to exist before contract was made).

[9] There is much discussion in the cases and the textbooks as to whether or not mistakes, to be the basis of a remedy, must be mutual. Much of this discussion results from a lack of clear definition of the word "mutual." In a case such as *Kyle* v. *Kavanagh* (103 Mass. 356), the plaintiff was negotiating about one property and the defendant another. Strictly speaking, the mistake was not mutual. They did not share the *same* error, but each was in error as to the understanding of the other and there was no valid contract at law or in equity.

In *Dzuris* v. *Pierce* (216 Mass. 132), the court says that such a misunderstanding touching the identity of the subject matter, in order to be ground for relief in equity, must not have arisen from the voluntary negligence or failure to obtain reasonably accessible knowledge on the part of the plaintiff, in the absence of fraud or duress. But, *if there is no contract*, why should equity not always relieve, by canceling the instrument, if there is one? Does not the court mean that where the language adequately describes the subject matter but the plaintiff erroneously believes it refers to some other subject matter, he can only have relief under the foregoing circumstances? In *Dzuris* v. *Pierce*, the deed correctly described the property the grantor intended to sell, but not that the grantee thought he had bought. The mistake, therefore, was unilateral and relief was only had there because of facts which in similar cases have been called constructive fraud.

In other cases, such as *Spurr* v. *Benedict* (99 Mass. 463) cited by Merwin as a case founded on unilateral mistake, there was clearly a mutual mistake as to the identity of the subject matter caused by misrepresentations, made through ignorance, by the defendant, who was the grantor in a deed.

[10] Mistake as to probability of occurrence of an event in the future is not mistake of fact, within the foregoing definition. Parke *v.* Boston, 175 Mass. 463.

Long *v.* Athol, 196 Mass. 497 (relief for contractor who relied upon erroneous engineering figures furnished by town).

Gould *v.* Emerson, 160 Mass. 438 (note drawn for erroneous amount on settlement of partnership accounts).

Bridgewater Iron Co. *v.* Enterprise Ins. Co., 134 Mass. 433 (existence of previous insurance not a fundamental fact).

But mutual mistake as to some matter collateral to the bargain itself (such as the value of property) is not a ground for relief in equity.[11]

Hecht *v.* Batchelder, 147 Mass. 335 (no relief where promissory note is bought through broker, with belief of all parties that maker was solvent. At law; but probably same rule in equity).

Wood *v.* Boynton, 64 Wis. 265 (stone sold for one dollar, mutually considered a topaz, proved to be diamond. No relief).

Mutual mistake as to one's existing legal title, duties or liabilities of property or contract, or as to a right of ownership dependent on a special law or a foreign law, is analogous to mistake of fact and may be the basis of relief.[12]

Livingstone *v.* Murphy, 187 Mass. 315 (mistake as to title leading to mistake in written instrument).

Tarbell *v.* Bowman, 103 Mass. 341 (mistake as to area).

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[11] But see Chapman *v.* Cole, 12 Gray 141. (Trover for coin thought to be fifty-cent piece but in fact a private coin of gold).

[12] This, of course, does not apply to compromises entered into for the purpose of settling rights. Pomeroy, sec. 849.

Short *v.* Currier, 153 Mass. 182 (mistake as to later incumbrances. Remedy was the changing of a mortgage discharge to an assignment).

Spurr *v.* Benedict, 99 Mass. 463 (innocent misrepresentations of essential features of land sold).

Boyden *v.* Hill, 198 Mass. 477 (a mistake by agreed vendor as to title, not mutual. No equitable relief for him, sued in contract).

Haven *v.* Foster, 9 Pick. 112 (mistake as to foreign law).

Shapira *v.* Wildey Sav. Bank, 213 Mass. 498 (bill to rescind purchase from defendant of a mortgage, part of which had been released).

Mistake usually must be mutual to be ground for relief as such, unless the mistake of a single party is not due to his culpable negligence, and is as to a fundamental fact in the transaction which was known or ought to have been known to, and should have been disclosed by, the other party, or unless there has been fraud or duress, actual or constructive.

Dzuris *v.* Pierce, 216 Mass. 132.

Clerk *v.* Boston, 179 Mass. 409 (contract. Voluntary ignorance or involuntary misinterpretation affords no relief).

Short *v.* Currier, 153 Mass. 182 (unilateral error as to condition of title relieved).

Chute *v.* Quincy, 156 Mass. 189.

Inasmuch as a claim that there has been a fundamental mistake, so that there has been no valid agreement, is a disaffirmance of the alleged contract, the only relief that can be given is a cancellation of such contract, if executory, or a rescission,

if executed. Equity cannot make a new contract for the parties.

Long *v.* Athol, 196 Mass. 497.

Shapira *v.* Wildey Sav. Bank, 213 Mass. 498 (decree placing parties *in statu quo*).

2. *Mistakes in Written Instruments.*

If a written instrument *inter vivos* clearly fails, through its form, or through an error of the scrivener, to express the prior agreement of the parties, equity will reform it upon clear proof of the agreement and of the mutual mistake in the writing, or the equivalent thereof (i. e. knowledge on the part of one that the other is laboring under a mistake as to the correctness of the writing).

Canedy *v.* Marcy, 13 Gray 373 (whole estate conveyed, through error, instead of "undivided two-thirds").

Bruce *v.* Bonney, 12 Gray 107 (discharge of mortgage on margin, instead of assignment).

Snell *v.* Atlantic F. M. Ins. Co., 98 U. S. 85 (mistake in name of insured in policy).

Hodge *v.* Cole, 140 Mass. 116 (failure of holder of note to indorse, on transfer).

Goode *v.* Riley, 153 Mass. 585 (both parties understood language in deed to describe smaller tract than actually described).

Gaylord *v.* Pelland, 169 Mass. 356 (seal omitted by mistake, may be added by equity).

Coates *v.* Lunt, 213 Mass. 401 (bill to require heirs of one who had defectively executed power, to confirm the deed).

Kennedy *v.* Poole, 213 Mass. 495 (to reform mortgage intended to be a deed. See decree of reformation).

J. P. Eustis Mfg. Co. *v.* Saco Brick Co., 198 Mass. 212 (see cases there collected).

But if one party understood the original agreement to be substantially as written, the other may not ordinarily have relief for mistake, in the absence of fraud.[13]

Sawyer *v.* Hovey, 3 Allen 331 (rule clearly stated).

German-American Ins. Co. *v.* Davis, 131 Mass. 316.

Page *v.* Higgins, 150 Mass. 27 (combination of unilateral mistakes).

Chute *v.* Quincy, 156 Mass. 189.

But a donor may have reformation of an instrument of gift that fails to express *his* intention at the time he made the gift. The donee, being a volunteer, is not entitled to relief.

German *v.* Grim, 32 Ind. 255.

Eaton *v.* Eaton, 15 Wisc. 259; 2 Ames 244.

Mistakes in wills are not corrected in equity (except that the court may interpret latent ambiguities as to names, descriptions, etc.).

Polsey *v.* Newton, 199 Mass. 450 (the word "grand-daughters" will not be reformed to "daughters").

[13] Mistake is sometimes said to be the formation of an incorrect mental picture of a situation. Fraud is mistake plus the unlawful causing of the incorrect mental picture by another.

Otis *v.* Coffin, 7 Gray 511 (devise in English will of "property at Boston, North America" held to include land in Brighton, Mass.).

Inasmuch as a claim that a written instrument does not express the agreement of the parties, is an affirmance of the original contract, the only relief given under such circumstances is that of reformation to conform to the agreement.

"Mistake of Fact" (E. H. Abbott, Jr.), Harvard Law Review, June, 1910.

3. *Relief Generally.*

Relief should be sought diligently, after the discovery of mistake.

Canedy *v.* March, 13 Gray 373 (although, in this case, relief was given twenty years after deed, it was shortly after discovery of error).

Gould *v.* Emerson, 160 Mass. 438 (statutes of limitations run from discovery, only).

If the party against whom the equitable right existed has died, suit may be brought against his heirs or personal representatives, who are volunteers.

Kennedy *v.* Poole, 213 Mass. 495.

Coates *v.* Lunt, 213 Mass. 401.

A party will usually be relieved from his own mistake only when no third person, without notice, has obtained rights; but he may recover the value of the property in place of the property, in an appropriate case.

Tarbell *v.* Bowman, 103 Mass. 341.

Dzuris *v.* Pierce, 216 Mass. 132 (where rights of an intervening mortgagee were protected).

The evidence required in Massachusetts as a basis for reforming a written instrument is stronger than that required in ordinary civil cases. It must be beyond a reasonable doubt.

Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 315.

German American Ins. Co. *v.* Davis, 131 Mass. 316.

Parol evidence, by the general rule, is competent to prove the existence of a mistake in a written instrument.

Snell *v.* Atlantic etc. Ins. Co., 98 U. S. 85.

Kennedy *v.* Poole, 213 Mass. 495.

Where it is sought to correct a mistake by adding to an instrument something required by the Statute of Frauds to be in writing, the original agreement must have been in writing, unless the defendant for some reason is precluded from setting up the Statute of Frauds as a defence.

Glass *v.* Hulbert, 102 Mass. 24.

Williams *v.* Carty, 205 Mass. 396.

If the plaintiff is an agent, and his principal who should have been liable under a contract is a non-resident, the plaintiff, instead of reformation, may have the defendant enjoined from enforcing the contract against him.

J. P. Eustis Mfg. Co. *v.* Saco Brick Co. 198 Mass. 212.

The relief may take the form of re-establishing a mortgage of which a discharge has been taken instead of an assignment.

Short *v.* Currier, 153 Mass. 182.

C. Fraud.

1. *Jurisdiction.*

The jurisdiction of equity over actual fraud was earlier than that of the common law[14] and in England is today general.[15] In America, while the jurisdiction of equity to administer equitable remedies in fraud (as well as to deal with cases of purely equitable fraud)[16] is exclusive, and to grant pecuniary remedies is concurrent, yet the equitable jurisdiction will commonly not be exercised in cases where the legal remedy is plain, adequate and complete.

Pomeroy, sec. 914.

Cook *v.* Scheffreen, 215 Mass. 444 (to set aside exchange of property).

The tendency in Massachusetts, however, since the courts have had full equity jurisdiction, has been toward the liberal English rule as to the jurisdiction of courts of equity in cases of fraud.

Billings *v.* Mann, 156 Mass. 203 (cancellation of deed; though writ of entry might have been had).

Fuller *v.* Percival, 126 Mass. 381 (cancellation of notes fraudulent as to a partner).

Stewart *v.* Joyce, 201 Mass. 301 (treasurer of company who put out untrue statement of condition in order to sell stock).

Fraud, going to the motives of a conveyance,

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[14] Hill *v.* Lane, L. R. 11 Eq. 215.
[15] Pomeroy, sec. 912.
[16] See Constructive Fraud, *infra*.

renders it voidable. In England, when a conveyance is avoided for fraud, reconveyance is regarded as necessary; in Massachusetts, upon avoidance, a writ of entry is permitted in a proper case, but the equitable remedy, requiring a reconveyance, is current.

Billings *v.* Mann 156 Mass. 203.

Speaking generally, those acts which would be sufficient ground for an action of tort for deceit[17] are sufficient for equitable relief where the relief afforded at law would not be adequate.

Thompson *v.* Barry, 184 Mass. 429 (misstatements of agent in purchasing property).

Batty *v.* Greene, 206 Mass. 561 (to compel restoration of money to man by woman who had lived as wife, knowing she had husband living).

Burleson *v.* Woodin, 212 Mass. 323 (decree for re-assignment of mortgage obtained by promoter).

Stewart *v.* Joyce, 205 Mass. 371 (rescission of sale of stock; bill by vendor).

Westlake *v.* Dunn, 184 Mass. 260 (deed fraudulently obtained and recorded set aside, even though innocent mortgagee had loaned).

Johnson *v.* Scott, 205 Mass. 294 (bill to rescind purchase of land in Maine, because of misrepresentation as to title).

Motherway *v.* Wall, 168 Mass. 333 (fraudulent statement as to grantor's title).

Brackett *v.* Perry, 201 Mass. 502 (land owner induced to sell by representation

[17] "It is still an open question here whether an action for a false representation of law will lie." Kerr *v.* Shurtleff, 218 Mass. 167.

of purchaser that no broker had acted in matter).

Pogrotsky *v.* Levatinsky, 218 Mass. 116 (to compel re-assignment of mortgage obtained by misrepresentations).

Equity may relieve from the results of such fraud.

Brown *v.* Statter, 206 Mass. 119 (by restraining the collection of notes, giving damages, etc.).

Stewart *v.* Joyce, 205 Mass. 371 (bill by vendor of stock; defendant having parted with it, damages were decreed with value as of date of transfer of stock; different rule if defendant sold after bill).

An unauthorized fraudulent representation (or promise) of an agent is good ground for rescission in a suit by the purchaser, against the principal.

Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1.

Thompson *v.* Barry, 184 Mass. 429.

2. *Constructive Fraud.*

Constructive fraud is that presumed by a court of equity from public policy or from the relationship and circumstances of the parties wholly apart from their intention. Under this designation are included,

a. *Fraud apparent from the bargain itself.*

Inadequacy of consideration, while not of itself fraudulent, if gross and supported by other slight evidence, warrants a finding of constructive fraud.

Graffam *v.* Burgess, 117 U. S. 192 (where defendant, for $200, got property worth $10,000).

Burrowes *v.* Locke, 10 Vesey, 471.

Davis *v.* Chicago Dock Co., 129 Ill. 180 (where defendant got $230,000 property at execution sale for $17.24).

Illegal contracts, or such general limitations as those in restraint of marriage or business, are fraudulent.

Otis *v.* Prince, 10 Gray 581.

Contracts unduly affecting officers of the government or of corporations are fraudulent.

West *v.* Camden, 135 U. S. 507 (permanent job to employees).

b. *Fraud presumed from the circumstances of the parties.*

1. Where one party is infirm, insane, drunk or under duress, the contract is voidable as to him.[18] These are sometimes said to be cases of "undue influence."

Smith *v.* Kenney, 213 Mass. 6 (deed from aged man by undue influence).

Campbell *v.* Lima, 212 Mass. 11 (deed from aged woman by undue influence).

2. Where one party holds a fiduciary or confidential relation with the other, the latter way avoid.

Purchases from, or sales to, himself, of trust property[19] by a trustee or by an attorney, by an agent of property entrusted him to sell, by an executor or administrator of any part of a decedent's estate, or by a guardian of his ward's property, whether directly or indirectly, at private sale or public auction,

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[18] In these cases, where the condition is established, there is a presumption of invalidity which may be overcome. Pomeroy, sec. 944.

[19] For a case where conveyance to one of three trustees, through a conduit, was held good, see Warren *v.* Pazolt, 203 Mass. 328.

are voidable at the election of the cestui, principal, heir, or ward, without any proof of actual fraud or undue influence.

Hawkes *v.* Lackey, 207 Mass. 425 (authorities collected).
Kelley *v.* Allin, 212 Mass. 327.
Rolikatis *v.* Lovett,[20] 213 Mass. 545 (an attorney who bought at foreclosure).

Contracts and conveyances, whether with or without consideration, between a lawyer and his client, a physician and his patient, a clergyman and his parishoner, a promoter and his corporation, or any other trusted advisor and his dependent, may be set aside[21](or otherwise dealt with) in equity upon slight evidence of undue influence, or of failure to provide the dependent party with the fullest disclosure of facts[22] or with an independent advisor. This is also true where there has been a contract or conveyance which is a breach of a fiduciary duty.

Huguinon *v.* Basley, 15 Ves. 273 (will made by patient in favor of physician).
Gargano *v.* Pope, 184 Mass. 571 (champartous contract between lawyer and client).
Hill *v.* Hall, 191 Mass. 253 (sale of securities by lawyer to client).
American Circular Loom Co. *v.* Wilson, 198 Mass. 182 (factory superintendent who takes assignment from inventor)

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[20] But see Clark *v.* Delano, 205 Mass. 224, where the agents' employment had been terminated by circumstances beyond his control. See also Manheim *v.* Woods, 213 Mass. 537, where transaction between attorney and client was found to be good, on the facts.

[21] As to who should be parties plaintiff where the defrauded person had died, see Parker *v.* Simpson, 180 Mass. 334.

[22] Some of these cases may properly be classed under Actual Fraud, because there is in them the element of misrepresentation by a concealment of material facts by one bound to disclose.

Essex Trust Co. *v.* Enwright, 214 Mass. 507 (newspaper reporter obtained lease of property absolutely essential to his paper).

Old Dominion Copper Co. *v.* Bigelow, 188 Mass. 315; 199 Mass. 488, 203 Mass. 159; 225 U. S. 111 (undisclosed profits of a promoter[23] recovered by corporation).

Old Dominion Copper Co. *v.* Lewisohn, 136 Fed. Rep. 915; 148 Fed. Rep. 1020; 210 U. S. 206.

Hawkes *v.* Lackey, 207 Mass. 425 (old ladies and law student).

Butler *v.* Gleason, 214 Mass. 248 (release obtained by physician from a patient relying on his statement, of no value in suit by her against him).

United Zinc Companies *v.* Harwood, 216 Mass. 474 (secret profits by director).

c. *Those transactions injurious to third persons.*

The most important class of these is

Fraudulent[24] *Conveyances.*

A conveyance by a debtor with intent to delay hinder or defraud his creditors, although good as between the parties, is, since 13 Elizabeth chap. 5 void as against creditors.

Mass. Rev. Laws, ch. 159, sec. 3, cl. 8 (the

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[23] For a case where all the stock was issued to the promoter and he was not liable to the corporation for profits, see Stratton Co. *v.* Stratton, 206 Mass. 117.

[24] Such conveyances are usually fraudulent as to creditors. But there may also be fraud as to the marital rights of an intended spouse which equity will remedy where grantee is a volunteer or had knowledge of the fraud. Allen *v.* Allen, 213 Mass. 29. Chase *v.* Phillips, 208 Mass. 245.

present Massachusetts statute to this effect).[25]

Mass. Rev. Laws, ch. 153, sec. 3 (which excludes from valid gifts of husband to wife,[26] those in fraud of creditors).

Shepherd *v.* Shepherd, 196 Mass. 179 (discussion of when a wife is a creditor of her husband, so as to get deed set aside).

Present statutes usually include transfers of any "property, right, title or interest, *real* or *personal.*" Such language covers choses in action and mortgages.

Drake *v.* Rice, 130 Mass. 410 (assignment of interest in account).

Gragg *v.* Martin, 12 Allen 498 (assignment of future wages).

King *v.* Cram, 185 Mass. 103 (assignment of life insurance).

York *v.* Flaherty, 210 Mass. 35 (payment of life insurance premiums and assignment of policies)[27].

At common law one might prefer a single creditor by satisfying his claim in full, and the act was not fraudulent as to other creditors. Under insolvency and bankruptcy laws transfers for such purposes may usually be set aside if made within a given period.

The remedy in equity,[28] to reach property con-

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[25] This statute has reference not only to fraudulent transfers, but also to purchases directly in the name of another, with fraudulent intent.

[26] Valid to extent of $2000 if wearing apparel, articles of personal ornament, and articles necessary for her personal use.

[27] See St. 1907, ch. 576, sec. 73, protecting policies payable to wife. See also Eldredge *v.* Mutual Life Ins. Co., 217 Mass. 444.

[28] At law, the debtor may be sued and the property fraudulently conveyed specially attached, under Mass. Rev. Laws, ch. 167, secs. 38-65. As the question of fraud is only settled after a writ of entry, this method is rather cumbersome compared with the equitable remedy.

veyed in fraud of creditors, is a bill to reach and apply an equitable interest,[29] brought by a creditor (with the debtor and his grantee as defendants), or a bill for cancellation and reconveyance by the debtor's executor,[30] administrator or bankruptcy trustee.

Crompton *v.* Anthony, 13 Allen 33 (by single creditor).

Busiere *v.* Reilly, 189 Mass. 518 (by a devisee to whom the right to sue was devised).

Coggan *v.* Ward, 215 Mass. 13 (by trustee in bankruptcy to recover chattels alleged to have been fraudulently transferred).

The transfers voidable under modern statutes are those made with an intent to defraud his creditors, by one actually insolvent, heavily in debt, or about to undertake a hazardous business, or by one who anticipates suit because of a present possible liability.

Parkman *v.* Welch, 19 Pick. 231 (heavily in debt).

Neuberger *v.* Klein, 134 N. Y. 35 (about to undertake hazardous business).

Livermore *v.* Boutelle, 11 Gray 217 (threatened divorce).

Shepherd *v.* Shepherd, 196 Mass. 179 (threatened separate support proceedings).

Leonard *v.* Bolton, 153 Mass. 428 (threatened bastardy proceedings).

Benson *v.* Benson, 70 Md. 253 (by a bankrupt).

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[29] Such a bill need not be for the benefit of other creditors. Silloway *v.* Columbia Ins. Co., 8 Gray 199.

[30] An executor or administrator ought, before bringing bill, to get a license of probate court to sell. Stockwell *v.* Shalit, 204 Mass. 270. If the executor himself is the fraudulent grantee, the creditor may have him removed. Fourth Nat'l Bank *v.* Mead, 214 Mass. 549. But this is not now necessary, Mass. St. 1915, ch. 151, sec. 7.

In such cases, ordinarily the grantee has paid no consideration but holds on a secret trust to reconvey. But even if a grantee has paid full consideration, if he participates in a fraudulent *intent* of the grantor, the sale may be set aside.

Wadsworth *v.* Williams, 100 Mass. 126.

But if the grantee has given a fair consideration and has no knowledge[31] of the fraudulent intent of the grantor at the time of his purchase, a transfer to him will not ordinarily be set aside.[32]

Pierce *v.* O'Brien, 189 Mass. 58 (and cases therein cited).

Holmes *v.* Winchester, 133 Mass. 140 (wife's release of dower is a *valuable* consideration. Transfer of stock good, notwithstanding her knowledge *at time of transfer*).

If there is actual fraudulent intent known to grantee, subsequent as well as pre-existing creditors may avoid the transfer and so may the grantor's bankruptcy trustee or assignee in insolvency.

Day *v.* Cooley, 118 Mass. 524, (and cases therein cited).[33]

Even transfers without consideration, of real or personal property, when made without fraudulent intent, are good as against all but creditors existing at the time; and such a conveyance "especially if made on the meritorious consideration of blood, or affection for children, or as a settlement to a wife,

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[31] Knowledge of fraud, and not "reasonable cause to have knowledge," is required in Massachusetts.

[32] But in many states sales of merchandise in bulk, not in the usual course of trade, is made by statutes fraudulent, if without notice to creditors, Mass. St. 1903, ch. 415.

[33] *Quaere.* For how long does this right of subsequent creditors persist?

is not as a matter of law fraudulent." Deep indebtedness may furnish strong evidence of fraud, but the question is one of fact for the jury.

Matthews *v.* Thompson, 186 Mass. 14 (rule stated).

Prewit *v.* Wilson, 103 U. S. 22 (promise of marriage on adequate consideration where wife ignorant of fraudulent intent, at time of ante-nuptial settlement).

Huntress *v.* Hanley, 195 Mass. 236 (promise of marriage adequate consideration, conveyance being made before marriage).

Deshon *v.* Wood, 148 Mass. 132 (promise before marriage to transfer after,[34] inadequate, where actual fraudulent intent, though wife ignorant).

Clark *v.* McMahon, 170 Mass. 91 (in absence of fraud, voluntary conveyance to wife through third person not void as to creditors).

Chase *v.* Phillips, 208 Mass. 245 (conveyance held not in fraud of future husband's marital rights).

Briggs *v.* Sanford, 219 Mass. 572 (conveyance to wife in satisfaction of equitable obligation not set aside for creditors).

Under certain circumstances, a conveyance by one insolvent, with no consideration moving from the transferee may not be fraudulent.

Bailey *v.* Wood, 211 Mass. 37 (execution of an oral trust imposed by a decedent from whom property was inherited).

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[34] In this case, the promise was oral and was not executed until after marriage. It was not enforceable as an antenuptial contract.

Hutchins *v.* Mead,[35] 220 Mass. 348 (conveyance to wife in satisfaction of equitable obligation).

A conveyance fraudulent as against creditors is good as between the parties. If the plaintiff can show a *prima facie* right to recover (as, for example, by reason of a resulting trust in his favor, or a contract to reconvey) without developing the fraud in the transaction, the court will not permit the defendant to set up his own fraud, or the plaintiff's fraud against a third person, as a defense.

Lufkin *v.* Jakeman, 188 Mass. 528 (resulting trust).

Taft *v.* Henry, 219 Mass. 78 (contract to convey).

Schmidt *v.* Schmidt, 216 Mass. 572.

At common law a conveyance of property to a creditor in satisfaction of a debt, made by one who was insolvent, was not fraudulent as to other creditors. Insolvency and bankruptcy laws, however, make such a transfer a preference, and fraudulent, if within a given period before adjudication.

Stockwell *v.* Shalit, 204 Mass. 270.

U. S. Bankruptcy Act 1898, sec. 60.

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[35] The effect of certain transactions between husband and wife are thus summarized in Hutchins *v.* Mead, 220 Mass. 348 by Rugg, J., "A husband may hold the title to property in his own name, which in truth belongs to his wife, upon a valid trust for her benefit. Property originally belonging to her, which she has handed over to him and which has been kept by him for a considerable period, may be found to constitute such a trust. If she has permitted him to hold it so that he has been enabled to and has in fact gained credit on the strength of his apparent ownership thereof, she may be estopped to claim it. Where the husband has recognized the existence of the trust and has discharged his fiduciary obligation by transferring the corpus of the trust to his wife, there is a sufficient consideration to support the conveyance. In a sense the trust has been executed and it is not necessary to imagine whether it might have been enforced at the suit of the wife."

d. *Transactions void as against public policy.*

There are certain other transactions which from their very nature are fraudulent as to third persons and therefore void as against public policy.

Palmbaum *v.* Magulsky, 217 Mass. 306.

3. *Remedies in Fraud.*

Cases involving fraud are so numerous that the choice of a particular remedy is often of the highest importance. Some of the more common follow:

a. *Remedies at Law.*

1. Action of tort for deceit.

Huntress *v.* Blodgett, 206 Mass. 318.
Brackett *v.* Perry, 201 Mass. 502.

2. Action of tort for deceit, to recover consideration paid, accompanied by tender back (rescission of an executed contract).

Nash *v.* Minn. Title Ins. & Trust Co., 163 Mass. 574.

3. Action of contract, for fraudulent violation of agreement.

Tuttle *v.* Batchelder & Lincoln Co., 170 Mass. 315 (fraudulent violation of agreement to appraise stock).

4. Action of contract against a debtor, attaching by means of general or special attachment (in the case of real estate) or by means of trustee process (in the case of personalty) property fraudulently conveyed to a third person.

Mass. Rev. Laws, ch. 167, secs. 38-65 (attachment).
Mass. Rev. Laws, ch. 189 (trustee process).

5. Action of contract to recover money obtained by fraud.

Trecy *v.* Jefts, 149 Mass. 211.
Hagar *v.* Norton, 188 Mass. 47.

6. Writ of entry, after avoidance of a conveyance (or foreclosure) for fraud.

Marvel *v.* Cobb, 200 Mass. 293 (the proper remedy for one out of possession).

7. By way of defense (legal or equitable) to actions at law.

Lima *v.* Campbell, 219 Mass. 253 (discussion of fraud as legal defence).
Dexter *v.* Fuller, 217 Mass. 219.
Harvey *v.* Squire, 217 Mass. 411 (but the fraud must have been part of the same transaction and have induced the contract).

8. Action of tort for personal injuries (in which case a release obtained by defendant, who was in a fiduciary relation to plaintiff, may not avail defendant).

Butler *v.* Gleason, 214 Mass. 248.

b. *Remedies in Equity.*

1. Reformation of a deed or other instrument (as in case of fraudulent alteration).

Niles *v.* Graham, 181 Mass. 41.

2. Cancellation[36] of an executory contract.

Fuller *v.* Percival, 126 Mass. 381 (note).

3. Rescission of an executed contract (with or without damages).

Cook *v.* Scheffreen, 215 Mass. 444 (rescission of exchange of property).

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[36] See the interesting decree in Rice *v.* Merrill, 215 Mass. 419, under which decree a trust was created for the benefit of the plaintiff, an aged person who brought a bill to set aside a deed for support.

Hill *v.* Hall, 191 Mass. 253.

O'Shea *v.* Vaughn, 201 Mass. 412 (giving incidents of rescission).

Murphy *v.* Robinson, 214 Mass. 585 (giving various incidents of relief by cancellation of deeds).

Stewart *v.* Joyce, 201 Mass. 301; s. c. 205 Mass. 371 (rescission, with rule for damages).

4. Compensation in damages.

Old Dominion Copper Co. *v.* Bigelow, 188 Mass. at 329 (violation of duty on the part of one in a fiduciary capacity, an "equitable tort").

Brown *v.* Statter, 206 Mass. 119 (compensation for a partial failure of consideration, through fraud).

5. Specific redelivery (with execution of any papers necessary to revest legal title) of property fraudulently conveyed or detained that cannot be replevied, or of money or property obtained by undue influence.

Batty *v.* Greene, 206 Mass. 561 (money obtained from man by woman fraudulently married to him).

Gibbens *v.* Peeler, 8 Pick. 254.

Holden *v.* Hoyt, 134 Mass. 181 (mortgage and note).

Porter *v.* Stuart, 203 Mass. 46 (lodging house furniture obtained by agent's fraud).

Stone *v.* Sargent, 220 Mass. 445 (insurance policy).

6. Injunctions against enforcement of obligations obtained by fraud; and temporary injunctions to prevent changes in subject matter during litigation.

Metcalf *v.* Williams, 104 U. S. 93 (against enforcing judgment).

Brown *v.* Statter, 206 Mass. 119 (against collecting notes, etc.).

7. Redemption from fraudulent foreclosure.
Clark *v.* Storey, 208 Mass. 36 (defendants chargeable with net profits; but allowed compensation for services).

8. By way of defense to specific performance.

Features of the Equitable Remedies.

The right to sue for fraud is not assignable at law or in equity.

United Zinc Companies *v.* Harwood, 216 Mass. 474.

But rights of action in equity to set aside instruments obtained by fraud are apparently assignable and pass by will.

Busiere *v.* Reilly, 189 Mass. 518.

There is a presumption that men act honestly. When, therefore, fraud is claimed, it must be alleged in detail and proven.

Barron *v.* International Trust Co., 184 Mass. 440.

A court of equity will not aid one who is guilty of laches.

Marvel *v.* Cobb, 200 Mass. 293.

A court of equity will refuse to act when its aid is sought by one who is a party to a fraud, to secure his share or the whole, of a fund created by that fraud, if his right to equitable relief is based upon the fraud.

Wilson *v.* Jackson, 204 Mass. 432.
Harvey *v.* Varney, 98 Mass. 118.

An action in equity to follow trust property procured by fraud does not fail on the death of the

defendant, although an action of tort for fraud fails under such circumstances.

Lovejoy *v.* Bailey, 214 Mass. 134.

In a case of constructive fraud, the Statute of Frauds has no application.

Mass. Rev. Laws, ch. 147, sec. 1.
Lurie *v.* Pinanski, 215 Mass. 229.

In the absence of fraud, nothing less than conduct that amounts to an abrogation of the contract or goes to the essence of it, or takes away its foundation, can be made ground for rescission by the other party.

Runkle *v.* Burrage, 202 Mass. 89.

In certain cases one may have the benefit of subrogation though he has been guilty of constructive fraud.

Adams *v.* Young, 200 Mass. 588.

Where a bill is brought to rescind a contract for fraud and no fraud is found, the bill will not be retained to modify the contract. Equity will not construct a new agreement for the parties.

Revere *v.* Revere Water Co., 218 Mass. 161.

The effect of a rescission of a conveyance obtained by fraud is to restore to the defendant a right of action he gave up in consideration of the conveyance.

Lima *v.* Campbell, 219 Mass. 253.

Fraud in the making of a contract may present a defence to an action on it where antecedent fraud would not (because merged in the contract).

Colonial Development Co. *v.* Bragdon, 219 Mass 170.

A beneficiary under an oral trust may compel one who has fraudulently obtained title from the trustee

to restore it. That there is no trust within the Statute of Frauds is no defense to the person thus fraudulently acting. But the trustee may set up such defense.

Reardon *v.* Reardon, 219 Mass. 594.

CHAPTER VII.

SPECIFIC PERFORMANCE OF CONTRACTS.

A. Affirmative Contracts Generally.
   a. Contracts about Land.
   b. Contracts about Chattels.
   c. Stocks and Bonds.
   d. Agreements to Arbitrate and to Give Options.
   e. Contracts Involving the Performance of Labor.

B. Negative Contracts Generally.
   a. Involving Personal Service.
   b. Limiting the Use of Property.
   c. Agreement not to Compete:
      1. Express agreements;
      2. Agreements implied from sale of good will.

C. Relief for and against Third Persons.
   a. Legal Easements.
   b. Certain Covenants Running with Land.
   c. Restrictions or Equitable Easements.

D. Statute of Frauds — Part Performance.

E. Partial Performance.

F. Time the Essence of the Contract.

G. Marketable Title.

H. Mutuality.

I. Necessity and Adequacy of Consideration.

J. Sundry Defenses and Incidents of the Remedy.

"Specific performance is a judicial order that a legal contract be carried into effect."

The remedy is strictly an equitable one.[1] At common law a party to a contract has his option to perform or to pay damages.

Ames, 37-38, note (a history of the rise of the remedy).

The right to specific performance of an agreement is not absolute but rests in the discretion of the court,[2] to be exercised upon equitable considerations and in view of all the circumstances of the case.

Banaghan *v.* Malaney, 200 Mass. 46 (superior mental ability of plaintiff, though not sufficient fraud to avoid contract).

Curran *v.* Holyoke Water Power Co., 116 Mass. 90 (rights of third person are an equitable consideration).

Chute *v.* Quincy, 156 Mass. 189 (defendant had a contract more onerous than he supposed).

Richardson Shoe Mach. Co. *v.* Essex Mach. Co., 207 Mass. 219 (conditions changed so that to enforce contract would work very result contract was intended to prevent).

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[1] The penalty for disobedience is, of course, punishment for contempt. Under certain conditions (see Mass. St. 1910, ch. 376) the court may appoint a master to convey property under decree. Eastern Bridge etc. Co. *v.* Worcester etc., 216 Mass. 426.

[2] Refusal of specific performance does not prevent a plaintiff suing at law for his damages and there proving ground on which decree was entered. The matter is not *res judicata*. Though refusing specific performance, an equity court may assess damages, where there is no remedy at law (as in Jackson *v.* Stevenson, 156 Mass. 496), but this is discretionary, not *ex debito justiciae*. It may allow the plaintiff to amend to an action at law (as in Merrill *v.* Beckwith, 168 Mass. 72) or may give him an election to proceed for damages at law or in equity (as in Levi *v.* Worcester Con. St. Ry., 193 Mass. 116). Institution for Savings, etc. *v.* Puffer, 201 Mass. 41. Banaghan *v.* Malaney, 200 Mass. 46.

Mansfield *v.* Sherman, 81 Maine 365; Ames 385.

Wentworth *v.* Manhattan, 216 Mass. 374.

Nickerson *v.* Bridges, 216 Mass. 416 (see *infra*).

Specific performance is decreed

1. When by reason of the specific subject matter of the contract and the impossibility of obtaining in the open market its exact counterpart, damages will not be an adequate compensation for its breach.

2. When by reason of special features making it impossible to arrive at a legal measure of damages, such compensation is impracticable.[3]

Pomeroy, sec. 1401.

Butterick Pub. Co. *v.* Fisher, 203 Mass. 122.

A. Affirmative Contracts Generally.

a. *Contracts about Land.*[4]

In the view of a court of equity a specific parcel of *land* has no duplicate. It is unique. An unobjectionable, valid, written, contract to convey an interest in land is therefore enforced as a matter of course in favor of vendor or vendee. This rule is not altered by the fact that similar land at a similar price, in the same neighborhood, is available.

Pomeroy on Specific Performance, secs. 9-10.

Ensign *v.* Kellogg, 4 Pick. 1.

Squire *v.* Learned, 196 Mass. 134 (bill by lessee's administrator to enforce agreement to renew lease).

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[3] In the development of the subject herein, little attention is paid to the distinction herein suggested. Many of the examples given may as readily be referred to the one proposition as to the other.

[4] See specific phases of the enforcements of land contracts under the headings (*infra*) of Agreements to Arbitrate and to Give Options, The Statute of Frauds — Part Performance, Partial Performance, Marketable Title, and Mutuality.

Staples *v.* Mullen, 196 Mass. 132 (enforcement by agreed vendor).

Galligan *v.* McDonald, 200 Mass. 299 (enforcement by agreed vendor).

But if the contract has been executed by the vendor so that nothing remains to be done except for the vendee to pay money, then the remedy at law is adequate, and the vendor may recover the purchase price, unless the Statute of Frauds is a good defence on the facts, in which case the vendor may recover the value of the property.

Jones *v.* Newhall, 115 Mass. 244.[5]

Kelley *v.* Thompson, 181 Mass. 122 (rule where contract was oral and within the statute).

b. *Contracts about Chattels.*

The ordinary chattel is not unique in the sense that a parcel of land is. If one may obtain its duplicate in the open market, a contract concerning the chattel will not be specifically enforced.

Fothergill *v.* Rowland, L. R. 17 Eq. 132; Ames 111 (contract to sell all coal mined for five years).

Jones *v.* Newhall, 115 Mass. 244 (dictum).

But specific performance of a contract relating to personal property may be enforced, by vendor or vendee, if the property is unique.[6]

Lowther *v.* Lord Lowther, 13 Vesey, 95 (a Titian).

Adams *v.* Messinger, 147 Mass. 185; Ames

[5] This case was decided before Massachusetts court had full equity jurisdiction. Under the facts there set forth, there would doubtless be equitable relief today. See Staples *v.* Mullen, 196 Mass. 132.

[6] See page 119 for note 6

50 (contract (a) to sell patented article; (b) to assign patent).

Cogent *v.* Gibson, 33 Beavan, 557; Ames 56 (specific performance obtained by vendor).

Roberts *v.* Cambridge, 164 Mass. 176 (agreement to furnish water).

Adderley *v.* Dixon, 1 Simons & Stuart 607; Ames 58 (to sell a claim of uncertain value)

Herbst *v.* Fidelia, etc. Corp'n, 218 Mass. 181 (agreement to return a prize cup if not entitled to it).

Howe *v.* Watson, 179 Mass. 30 (agreement to leave property by will).

French *v.* Boston Nat'l Bank, 179 Mass. 404 (agreement to re-deliver pledged stock)

So an agreement to compromise a will may be enforced if all parties were *sui juris* and assented to the compromise.

Parker *v.* N. E. Trust Co., 215 Mass. 226 (giving further requisites of Massachusetts statutory compromise).

Blount *v.* Wheeler, 199 Mass. 330 (although property was personalty).

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[6] It is not uncommon to cite under this head cases which are really specific reparation of a tort, rather than performance of a contract. In the case of reparation of a tort the jurisdiction may arise from the conversion of a chattel so unique that nothing short of the return of the chattel itself will afford adequate relief. This remedy has been afforded in cases involving the conversion of deeds, papers of a society, heirlooms, securities of an estate, slaves, etc. Duke of Somerset *v.* Cookson, 2 P. Wms. 390; Ames, 39; and numerons cases in note, Ames, 39. This remedy, sometimes called specific delivery or equitable replevin, has been made in Massachusetts broad enough to allow the recovery of all articles (whether rare or not) "that have been taken or detained from the owner and so secreted or withheld that they cannot be replevied." Rev. Laws, ch. 159, sec. 3, cl. 1; Strickland *v.* Fitzgerald, 7 Cush. 530 (horse); Maxham *v.* Day, 16 Gray 213 (jewelry worn on the person); Gaff *v.* Cornwallis, 219 Mass. 226 (a specific legacy).

So an agreement of one partner to sell his interest in his business for a fixed sum to the other partner may be enforced.

Murphy *v.* Murphy, 217 Mass. 233 (liquor saloon; bill against deceased partner's administrator).

If the failure of a party who has agreed to sell an article of which there is only a limited supply (although the article itself be not unique) would result in irreparable damage, and perhaps utter destruction of the business of the agreed vendee, damages at law may not be adequate and specific performance may be had.

Gloucester Isinglass, etc. Co. *v.* Russia Cement Co., 154 Mass. 92 (agreement to sell fish skins).

Florence Sewing Machine Co. *v.* Grover, etc. Co., 110 Mass. 1.

Equitable Gas Light Co. *v.* Baltimore Coal Tar Co., 63 Md. 285 (agreement to sell coal tar).

But even though the subject matter be unique, money damages at law are adequate if the original agreement has set a value on the property.

Dowling *v.* Betjemann, 2 Johnson & Hemming 544; Ames 40 (agreement as to painting, which set value at which picture could be purchased).

In some cases where there would ordinarily be no specific performance, it has been decreed when the plaintiff has paid full consideration but the insolvency of the other party has made a remedy at law inadequate.

Clark *v.* Flint, 22 Pick. 231 (against the intended vendor's assignees).

Parker *v.* Garrison, 61 Ill. 250; Ames 44.

Hamilton *v.* St. Louis Bank, 3 Dillon 230 (against assignee in bankruptcy to recover six bonds).

Holmes *v.* Winchester, 133 Mass. 140 (dictum).

The remedy at law may be equally inadequate, where the plaintiff has loaned money to the defendant upon his promise to give certain security.[7] "An agreement to give a mortgage is a mortgage in equity."

Hermann *v.* Hodges, L. R. 16 Eq. 18; Ames 61.

Westall *v.* Wood, 212 Mass. 540.

c. *Stocks and Bonds.*

A contract for the sale of stocks or bonds commonly dealt with in the market, in the absence of unusual circumstances, will not be enforced. The subject matter is not unique.

Duncuft *v.* Albrecht, 12 Simons 189; Ames 55.

But such a contract will be specifically enforced in the case of stock if the shares are such as are not readily procurable in the market.

Adams *v.* Messinger, 147 Mass. 185; Ames 50.

New England Trust Co. *v.* Abbott, 162 Mass. 148 (agreement, indorsed on share of stock, that in certain contingency stock should be transferred to corporation, enforced).

d. *Agreements to Arbitrate and to Give Options.*

An agreement to arbitrate an entire controversy,

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[7] But an agreement to lend or borrow money will not be enforced. Rogers *v.* Challis, 27 Beavan 175; Ames 61.

except an agreement made in conformity with some statute,[8] is not enforceable. There is no action at law for its breach and no enforcement of it in equity. The enforcement of such an agreement would tend to oust the courts of their jurisdiction of the subject matter.

Wood *v.* Humphrey, 114 Mass. 185 (cancellation of royalty contract despite plaintiff's failure to submit to arbitration).

Vass *v.* Wales, 129 Mass. 38 (as to repairs in lease).

Pearl *v.* Harris, 121 Mass. 390 (agreement in partnership papers).

White *v.* Middlesex R. R., 135 Mass. 216 (corporation officer sole judge of forfeiture of deposit. Void).

Miles *v.* Schmidt,[9] 168 Mass. 339 (equity).

But an agreement that certain minor questions shall be submitted to arbitration, though not enforceable in equity, is not invalid. If made a condition precedent, no suit will lie until an offer to submit is first made. If not a condition precedent, it may be revoked before an award.[10]

Lamson Consolidated etc. Co. *v.* Prudential F. Ins. Co., 171 Mass. 433 (arbitration clause in standard policy, a condition precedent).

But see Reed *v.* Washington Ins. Co., 138 Mass. 572 (old form in policy. Not a condition precedent. Revocation by suit).

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[8] See Mass. Rev. Laws, ch. 194, for a statutory method.

[9] The court in this case avers that if the question were then a new one (1896) no objection would be found to permitting parties to select their own tribunals.

[10] In case of revocation of a valid agreement to submit to arbitration, the party aggrieved by the revocation may recover damages therefor. Pond *v.* Harris, 113 Mass. 114.

But when an award under an agreement to arbitrate has been made, equity may be invoked to enforce specific performance of it in a proper case.

Hall *v.* Hardy, 3 P. Wms. 187; Ames 65.

Penniman *v.* Rodman, 13 Met. 382 (award ordering conveyance).

Bartlett *v.* Slater, 182 Mass. 208 (specific performance of statutory compromise of a will).

Howe *v.* Nickerson, 14 Allen 400 (money award; remedy at law adequate).

Duffy *v.* Hogan, 203 Mass. 397 (compromise of a will).

A contract to buy or sell at a price to be fixed by arbitration will not be specifically enforced, unless the price has actually been fixed.

Agar *v.* Macklew, 2 Simons & Stuart, 418; Ames 67.

N. E. Trust Co. *v.* Abbott, 162 Mass. 148 (price fixed. Enforced).

Palmer *v.* Clark, 106 Mass. 373.

Miles *v.* Schmidt, 168 Mass. 339.

A contract to give the plaintiff an option on certain property in case the defendant wishes to sell, is not enforceable.

Fogg *v.* Price, 145 Mass. 513 (in which no price was named).

Chandler *v.* McDonald-Weber Co., 215 Mass. 365.

But see Manchester Ship Canal Co. *v.* Manchester Co., L. R. (1901) 2 Ch. 37 (an injunction against selling until offered to plaintiff).

e. *Contracts Involving the Performance of Labor.*

Contracts to do continuous acts or involving continuous employment of people and oversight of the

court are not ordinarily enforced in equity.[11]

Powell Duffryn Coal Co. *v.* Taff Vale Ry. Co., L. R. 9 Ch. App. 331; Ames 79 (refusal to order a railway to keep its contract to operate signals for the plaintiff).

Adams *v.* Messinger, 147 Mass. 185; Ames 50 (principle discussed, but performance ordered).

Berliner Co. *v.* Seaman, 110 Fed. Rep. 30 (contract for agency of machine for several years. No performance).

Ryan *v.* Mutual Ass'n, (1893) 1 Ch. 116 (contract by landlord to furnish porter service).

Medford & C. R. Co. *v.* Somerville, 111 Mass. 232 (to build railroad track).

See cases cited, Ames 81, note.

But in many cases, the court has, in its discretion, enforced such contracts where particular hardship would otherwise result.

Hood *v.* North Eastern Ry. Co., L. R. 8 Eq. 666; Ames 82 (contract of railroad with land owner that it will maintain station).

Prospect Park etc. Co. *v.* Coney Island etc. Co., 144 N. Y. 152; Ames 83 (contract to run connecting cars).

Adams *v.* Messinger, *supra* (manufacture of patented article, not otherwise obtainable. No skill required).

Newcomb *v.* Norfolk St. Ry. Co., 179 Mass.

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[11] "The court to the end of time may be called upon to determine not only whether the prescribed quantity . . . has been delivered, but also . . . whether it was of suitable size or shape or proportion." Marble Co. *v.* Ripley, 10 Wallace 340.

449 (enforcement under statute of provision in franchise requiring street watering).

See cases cited Ames 86, note.

See also Turner *v.* Revere Water Co., 171 Mass. 329 (mandatory injunction ordering water company to furnish plaintiff with water).

So in the ordinary case of a contract for building repairs, enforcement will not be decreed.

Flint *v.* Brandon,[12] 7 Vesey 159; Ames 69 (repairs by lessor).

Kansas etc. Co. *v.* Topeka etc. Co., 135 Mass. 34 (general reason not discussed; particular reason governed).

But equity courts may enforce contracts requiring some building to be done, and will do so if the circumstances require.

Jones *v.* Parker, 163 Mass. 564; Ames 73. (specific performance of agreement in lease, to instal heating and lighting system. Lessor had control of basement).

Lane *v.* Newdigate, 10 Vesey 192; Ames 74 (to restore stop-gate. In form, an injunction against depriving plaintiff of flow of water. The effect was to require complete repairs of stop-gate).

Mayor *v.* Emmons L. R. (1901) 1 K. B. D. 515; Ames 76 (agreement to build on land, in consideration of conveyance).

A contract for personal service will not be enforced in favor of employer or employee. Enforced labor is contrary to the spirit of the law.

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[12] For an earlier case, *contra*, see Holt *v.* Holt, 2 Vernon 322; Ames 68.

Robertson *v.* Baldwin, 165 U. S. 275.
Wakeham *v.* Barker, 82 Cal. 46; Ames 87.
See other cases cited Ames 87, note.

B. Negative Contracts Generally.

Certain contracts, negative in form, are enforced by enjoining a party from doing the act he has agreed not to do, even though the allied affirmative covenant is not enforceable in equity.

Butterick Pub. Co. *v.* Fisher, 203 Mass. 122 (agreement to sell no other patterns than plaintiff's).[13]

United Shoe Mach. Co. *v.* Kimball, 193 Mass. 351.

Anchor Electric Co. *v.* Hawkes, 171 Mass. 101.

Palmer *v.* Lavers, 218 Mass. 286 (agreement not to appeal a case brought in a lower court).

a. *Involving Personal Services.*

Certain contracts for personal services, the affirmative provisions of which will not be enforced,[14] may be specifically enforced (in some jurisdictions)[15] in respect to their negative provisions.

Lumley *v.* Wagner, 1 DeGex, Macnaghten

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[13] But see Mass. Rev. Laws, ch. 56, sec. 1, referred to therein.

[14] See *supra*, Contracts Involving The Performance of Labor.

[15] The rule probably prevails in Massachusetts. In Rice *v.* D'Arville, 162 Mass. 559, the court expressly avoids deciding whether such negative contracts will ever be enforced, but in the case refused to enforce a negative contract of a singer not to sing elsewhere, because it did not appear that plaintiff (a theatrical manager) was able to carry out his financial part of the agreement. The case of Lumley *v.* Wagner has been cited with approval, however, in Peabody *v.* Norfolk, 98 Mass. 452, in Citizens' Loan Ass'n *v.* B. & M. R. R., 196 Mass. 528, and in Butterick Pub. Co. *v.* Fisher, 203 Mass. 122. See Mass. St. 1914, ch. 778, with reference to its possible effect on such a case.

and Gordon 604; Ames 93 (singer agreed to sing for one theatre and *not to sing for any other*. Latter provision enforced).

Morris *v.* Colman, 18 Vesey 437; Ames 89 (playwrights, partners, with agreement not to write except for their joint enterprise).

Harrison *v.* Glucose Sugar Ref. Co., 116 Fed. Rep. 304 (highly paid manager. Damage from use of trade secrets an element).

If, however, the services of the defendant have no peculiar value but can readily be replaced, relief is ordinarily denied.

Carter *v.* Ferguson, 58 Hun. 569; Ames 121 (ordinary actor. Relief denied).

Phila. Ball Club *v.* Lajoie, 202 Penn. 210 (star ballplayer. Relief under rule).

A contract to work for a party does not, in the absence of express language, *imply* a contract to work for no other.

Whitwood Chemical Co. *v.* Hardman, L. R. (1891) 2 Ch. 416; Ames 117.

Contra: Montague *v.* Flockton, L. R. 16 Eq. 189; Ames 105.

An employee owes a duty[16] not to reveal the trade secrets of his employer. He may be enjoined from so doing.

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[16] This duty may arise under an express contract or be implied from his fiduciary employment. Professor Ames says that even a stranger discovering another's trade secrets by wrongful means or by mistake may be enjoined from disclosure. See also F. W. Dodge Co. *v.* Construction Information Co., 183 Mass. 62 (restraining defendant from publishing news, the property of the plaintiff, a rival). But an innocent purchaser of trade secrets may use them. Chadwick *v.* Covell, 151 Mass. 190.

Solomon *v.* Hertz, 40 N. J. Eq. 400; Ames 128 (tanning secrets).

Peabody *v.* Norfolk, 98 Mass. 452 (express agreement as to machinery secrets).

Simmons Medicine Co. *v.* Simmons, 81 Fed. Rep. 163 (formula).

b. *Limiting Use of Property.*

Contracts wholly in restraint of trade are void. But one by which a manufacturer agrees not to sell to his customers' competitors has been held valid and has been enforced in equity.

N. Y. Bank Note Co. *v.* Kidder Press Mfg. Co., 192 Mass. 391.[17]

Dietrichsen *v.* Cabburn, 2 Phillips 52; Ames 108 (patent medicine).

But see Mass. St. 1908, ch. 454 ("an act relative to monopolies and discriminations in the sale of articles or commodities in common use").

And a contract made by a retailer with a manufacturer that in consideration of a reduced rate he will not sell any other competing make of a certain kind of goods may be enforced.[18]

Butterick Pub. Co. *v.* Fisher, 203 Mass. 122.

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[17] In this case the defendant did not plead 26 U. S. Stat. at Large 209 (Now U. S. Comp, Stat. 1901, p. 3200) commonly called the anti-trust act. This act must be pleaded specially if the defendant seeks the advantage of it. See also Mass. St. 1908, ch. 454, which apparently does not change the common law, except to give the Attorney General or District Attorney the right to ask for an injunction against certain illegal monopolies.

[18] But see Mass. Rev. Laws, ch. 56, sec. 1, making it a criminal offense to impose a condition in the sale of goods that the purchaser shall not sell or deal in the goods of any other person. See also Mass. St. 1908, ch. 454, prohibiting certain monopolies. But such a negative agreement will not be implied. Fothergill *v.* Rowland, L. R. 17 Eq. 132; Ames 111.

Metropolitan Elec. Co. *v.* Gooder, L. R. (1901) 2 Ch. 799.

John Bros. etc. Co. *v.* Holmes, L. R. (1900) 1 Ch. 188; Ames 149.

But a restriction which has the effect to drive all competitors from the field is a monopoly and will not be protected.

Merchants' Legal Stamp Co. *v.* Murphy, 220 Mass. 281 (trading stamps).

A court of equity will refuse specific performance of a contract which is in direct aid of an illegal combination amounting to monopoly of trade or commerce among the states, under the federal laws.

United Shoe Mach'y Co. *v.* La Chapelle, 212 Mass. 467 (excellent discussion).

The holder of a patent has an absolute monopoly of the invention, not affected by the Federal Anti-Trust Acts, and may annex such conditions as he chooses to the use of his invention. He has no immunity however from general lawsuits affecting his patent rights.

Henry *v.* A. B. Dick Co., 224 U. S. 1.
United Shoe Mach'y Co. *v.* La Chapelle, *supra.*

c. *Agreements not to Compete.*

1. *Express Agreements.*

An agreement not to compete made in connection with the sale of a business, will be enforced in equity, where reasonably necessary[19] for the preservation and

[19] For cases where such covenants have been bad, see Bishop *v.* Palmer, 146 Mass. 469 (covenant unrestricted as to space made in connection with local business), and Gamewell Fire Alarm Telegraph Co. *v.* Crane, 160 Mass. 50. For a review of the English authorities on contracts in restraint of trade, see Nordenfelt *v.* Maxim, Nordenfelt Guns & Ammunition Co., (1894) App. Cases 535.

protection of the property sold.

Palmer *v.* Stebbins, 3 Pick. 188.
Pierce *v.* Woodward, 6 Pick. 206.
Dean *v.* Emerson, 102 Mass. 480 (mercantile business).
Ropes *v.* Upton, 125 Mass. 258 (agreement not to compete in same town).
Handforth *v.* Jackson, 150 Mass. 149.
Anchor Electric Co. *v.* Hawkes, 171 Mass. 101 (history of enforcement of contracts in restraint of trade).
Diamond Match Co. *v.* Roeber, 106 N. Y. 473; Ames 123.
United Shoe Mach. Co. *v.* Kimball, 193 Mass. 351 (*dictum* that covenant may be unlimited in time and space).

2. *Agreements Implied from Sale of Good Will.*

In Massachusetts,[20] a vendor (whether a sole trader or a partner) who has voluntarily sold the *good will* of a business may be enjoined from setting up a competing business that derogates from the grant made by the sale. Whether or not a business does this, is a question of fact.[21] The bill may be brought by the vendee or one who succeeds to his title.

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[20] The English rule is that after a voluntary sale of a general merchandise business with the good will, the vendor may establish a new business in competition but may not solicit his former customers or direct his efforts against those activities which belong to the business for which he had been paid. Trego *v.* Hunt (1896) App. C. 7 (overruling Pearson *v.* Pearson, 27 Ch. D. 145). Labouchere *v.* Dawson, L. R. 13 Eq. 322.

In the following American cases a former partner, having sold his good will, was allowed to solicit old customers by public advertisement or by direct and personal solicitation. Cottrell *v.* Babcock Co., 54 Conn. 122. Williams *v.* Farrand, 88 Mich. 473. Vonderbank *v.* Schmidt, 44 La. Ann. 264.

[21] See page 131 for note 21.

Angier *v.* Webber, 14 Allen 211 (express route).

Dwight *v.* Hamilton, 113 Mass. 175 (physician).

Munsey *v.* Butterfield, 133 Mass. 492 (milk route).

Old Corner Book Store *v.* Upham, 194 Mass. 101 (book store; suit by assignee of vendee).

Foss *v.* Roby,[22] 195 Mass. 292 (dentists).

Marshall Engine Co. *v.* New Marshall

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[21] The history of this line of cases in Massachusetts is interesting. Bassett *v.* Percival, 5 Allen 345, decided in 1862, plainly stated there was no implied agreement not to compete (in that case by opening a grocery store across the street) raised from the sale of a business and good will. In Angier *v.* Webber, 14 Allen 211, there was an express stipulation not to injure the good will of an express business which the defendant sold and a violation of this was enjoined. In Dwight *v.* Hamilton, 113 Mass. 175, the sale of a "physician's practise and good will" was said to raise an implied covenant not to disturb or injure the vendee in the enjoyment of that which he purchased. This rule, apparently *contra* to the rule in Bassett *v.* Percival, has been followed in all the later cases except Hoxie *v.* Chaney, 143 Mass. 592, where an attempt was made to re-state the rule somewhat as in Bassett *v.* Percival, and to distinguish that case from Angier *v.* Webber, Dwight *v.* Hamilton, etc., on the ground that in the former case the business was local and in the latter cases extended over "considerable region or line of travel." In Old Corner Book Store *v.* Upham, 194 Mass. 101, and in Marshall Engine Co. *v.* New Marshall Engine Co., 203 Mass. 410, further attempts are made to distinguish the two lines of cases, by saying that in Bassett *v.* Percival it was found *as a fact* that the new business did not derogate from the grant made by the sale, while in Angier *v.* Webber, and other cases it was found that it did. But this is hardly true, for Bassett *v.* Percival is plainly decided on the ground that no contract is implied from the sale of good will. It is perfectly plain that Bassett *v.* Percival is not law today and that the implied agreements set forth in the text above express the law today.

See statement in 10 L. R. A. (N. S.) 120 note, to the effect that Dwight *v.* Hamilton, *supra*, and Foss *v.* Roby, *supra*, seem to be the only cases found anywhere which hold that the sale of the good will of a professional practise implies a covenant not to compete.

[22] See this case for an award of damages, in addition to the injunction.

Engine Co., 203 Mass. 410 (manufacturing engines).

Hoxie *v.* Chaney, 143 Mass. 592 (wherein sale of "all right, title and interest" in partnership property included the good will contributed in partnership articles).

A covenant not to compete, express or implied, may be enforced even though the vendor does not compete individually but as agent for, or partner with, another.

Dean *v.* Emerson, 102 Mass. 480 (partner).

Old Corner Book Store *v.* Upham, 194 Mass. 101 (retiring partner organized new corporation to compete).

Boutelle *v.* Smith, 116 Mass. 111 (retiring partner drove bread cart as agent for another).

The covenant not to compete implied from the sale of the good will of a business may be unlimited in time. The area covered is a question of fact.

Foss *v.* Roby, 195 Mass. 292.

Dwight *v.* Hamilton, 113 Mass. 175.

Marshall Engine Co. *v.* New Marshall Engine Co., 203 Mass. 410 (unlimited area).

Where there is a sale of the good will of a partnership by reason of the death or bankruptcy of a partner, such sale,[23] while carrying with it everything of

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[23] This is the rule in Massachusetts and many other jurisdictions. In England a sale of the good will by the surviving member of a firm is conducted on the same basis as a voluntary sale by a sole trader, that is, the seller may compete with the purchaser but may not solicit former customers. In the case of a sale in bankruptcy, however, the bankrupt may compete and solicit, as in Massachusetts. *In re David*, (1889) 1 Ch. 378. Trego *v.* Hunt, (1896) A. pp. C. 7.

advantage belonging to the existing business,[24] leaves the former member of the firm, or the bankrupt, free to start a competing business and even to solicit former customers.

Moore *v.* Rawson, 199 Mass. 493 (good discussion of value of such good will).

Hutchinson *v.* Nay,[25] 187 Mass. 262.

When one sells a business with no mention of good will, although he may engage in the same kind of business under the old name, he may under some circumstances be enjoined from conducting the business so as to injure that which he has sold.

Fairfield *v.* Lowry, 207 Mass. 352 (may not solicit former customers).

A sale of goods and chattels as shown on the books does not imply a sale of the good will.

Webster *v.* Webster, 180 Mass. 310.

C. Relief for and against Third Persons.

In order to understand the equitable doctrine of restrictions, it is necessary to keep in mind certain distinctions between the following:

a. *Legal Easements*,[26] which are incorporeal rights[27]

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[24] The right to advertise as *successors* to the old firm is such an advantage; though the business may not be conducted under the old firm name. Moore *v.* Rawson, 199 Mass. 493. See also Mass. R. L. ch. 72, sec. 5. Lothrop Pub. Co. *v.* Lothrop, etc., Co., 191 Mass. 353.

[25] See discussion of this case in Hutchins *v.* Page, 204 Mass. 284, where there was an accounting between parties after termination of the partnership.

[26] Legal easements are referred to here, only to make clear the distinctions between them and equitable easements, so-called. For injunctions against interference with legal easements, see Chapter IX herein.

[27] These rights are usually appurtenant to other property, called the dominant estate. They may, however, be *in gross*, that is, appurtenant to no particular premises, but belonging to the *person* possessing the easement, and if so created are inheritable and assignable interests. Goodrich *v.* Burbank, 12 Allen 459 (right to take water from a well).

in real property of another (as, for example, rights of way) arising from grant, devise, reservation, prescription, implication, estoppel, or necessity. When once created they run, *by way of benefit*, with the dominant estate and pass to the assignee of the owner of the estate even though not mentioned in the deed to him. They bind *by way of burden* the assignee of the owner of the servient estate.

Brown *v.* Thissel, 6 Cush. 254 (way created by reservation).

King *v.* Wight, 155 Mass. 444 (reciprocal easements created by party wall indenture)

Gorton Pew Fish. Co. *v.* Tolman, 210 Mass. 402 (implied easements discussed).

Tufts *v.* Charlestown, 2 Gray 271 (easement by estoppel).

An easement is commonly created by a deed poll[28] and concerns real estate only. It is a *jus in rem* as distinguished from a mere covenant or personal undertaking. It may, however, be created by words sounding in covenant, if the seeming covenant is for a present enjoyment of a nature recognized by law as capable of being treated as a *jus in rem* and not merely the subject of personal undertaking, and if the deed discloses that the covenant is for the benefit of adjoining land conveyed at the same time.

Hogan *v.* Barry, 143 Mass. 538 (covenant of grantor in deed that no building will be erected on lot adjoining that conveyed, nearer than four feet to line).

Norcross *v.* James, 140 Mass. 188; Ames 182 (discussion of certain "new and unusual incidents" which cannot be the subject of easement).

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[28] The usual form of deed in Massachusetts, signed by the grantor only.

b. *Certain Covenants Running with Land*[29] *and Enforceable at Law.*

These include

1. Certain covenants in deeds, as that of warranty in a deed poll, which binds the grantor and his heirs and runs by way of benefit with the land to the grantee's heirs and assigns.

Slater *v.* Rawson, 6 Met. 439.

Peters *v.* Stone, 193 Mass. 179 (by lessee in indenture to make improvements and leave them at the end of the term).

2. Certain covenants[30] "touching and concerning land" (and not merely personal undertakings)[31] and creating interests in the nature of easements and enforceable between parties having privity of estate.[32]

Morse *v.* Aldrich, 19 Pick. 449 (agreement between mill owners as to use of mills).

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[29] See note on page 137 as to certain covenants that "run with the business" in equity — and perhaps to some extent at law.

[30] The obligation of a grantee arising from the acceptance of a deed poll is, of course, not a covenant of the grantee, but an undertaking which, *at law*, does not run with the land and is not an easement, although in equity in certain cases it may amount to an easement or restriction and run with the land. Martin *v.* Drinan, 128 Mass. 515 (stipulation that grantee shall repair building on grantor's adjoining land). Kennedy *v.* Owen, 136 Mass. 199 (stipulation that grantee shall fence between properties). Lincoln *v.* Burrage, 177 Mass. 378 (party wall agreement in deed poll). Childs *v.* B. & M. R. R., 213 Mass. 91 (stipulation in deed poll that grantee shall create a way *in futuro* over granted land). And see *Equitable Easements, infra.*

[31] Where one party covenants with another in respect to land, and at the same time with and as a part of making the covenant, neither parts with nor receives any title or interest in the land, nor creates an easement or a right in the nature of an easement for the benefit of the land, such a covenant is at best a mere personal contract which does not run with the land. See King *v.* Wight, 155 Mass. 444 (dictum).

[32] Privity of estate is necessary in order that these covenants shall run with the land. As to what constitutes privity of estate, see Norcross *v.* James, 140 Mass. 188.

Savage *v.* Mason, 3 Cush. 500 (party wall agreement).

Bronson *v.* Coffin, 108 Mass. 175 (agreement of grantor to fence adjoining land).

c. *Restrictions, or Equitable Easements.*

An equitable easement is a stipulation as to the use of property, real or personal, which may be specifically enforced[33] (by injunction) in equity by one who has no *legal* title or interest in the property restricted and no covenant which he may enforce at law. It is also enforceable in equity against one who is a purchaser (with notice actual or constructive) [34] from one originally bound by it. It is commonly created by the acceptance of a deed poll containing restrictive clauses.[35] It may also be created by a statute under which the state sells land.

Whitney *v.* Union Railway Co., 11 Gray 359 (general discussion. Land restricted as to its use for trade).

Schwoerer *v.* Boylston Market, 99 Mass. 285 (lot not to be built on).

Tulk *v.* Moxhay, 2 Phillips, 774; Ames 147 (real estate).

Mass. Inst. of Technology *v.* Boston Soc.

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[33] This enforcement is on the theory that one who buys property with notice that his predecessor in title has agreed to the restriction of its use, must in equity conform to that agreement. Bailey *v.* Agawam Nat'l Bank, 190 Mass. 20; Childs *v.* B. & M. R. R., 213 Mass. 91.

[34] Thus a mandatory injunction may issue against one who has inherited land and is actually ignorant of restrictions, if he has constructive notice. Allen *v.* Barrett, 213 Mass. 36.

[35] As the restrictions, common in deeds, against building within a certain distance of the street or against using a building for offensive trades or for more than a certain number of families. See numerous restrictions in Renals *v.* Cowlishaw, 9 Ch. D. 125; Ames 159. Clauses consisting of words apt to create a condition at common law are frequently interpreted as restrictions. Cassidy *v.* Mason, 171 Mass. 507.

Nat. History, 218 Mass. 189 (created by statute).

John Bros. Abergarw Brewery Co. *v.* Holmes, [36] L. R. (1900) 1 Ch. 188; Ames 149 (agreement of innkeeper that he and assigns should sell only John Bros. beer, enforced by successors to John Bros. against lessee of innkeeper, with notice).

Murphy *v.* Christian, etc., Publishing Co., 38 N. Y. App. Div. 426; Ames 157 (agreement between publisher owning copyright and a licensee as to minimum price for books, enforced by licensee against purchaser of publisher's business).

Francisco *v.* Smith, 143 N. Y. 488; Ames 186 (agreement not to compete for five years enforceable by purchaser from vendee. It is an asset of business).

Restrictions created by the acceptance of deeds poll, are the commonest in form. If intended to benefit other land,[37] the right to enforcement in equity is in the owner[38] or owners of the other land and his or their successors in title.[39]

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[36] This, and the next two cases cited, have to do with the enforcement of covenants restricting the use of personal property. Between the original parties to the agreements, at least, there probably could have been recovery of damages at law, but the importance of these cases is that agreements apparently of a personal nature are here enforced in equity not between the parties thereto, but against third persons who have acquired the restricted personal property with knowledge of the restrictions. *Quaere* as to what extent in appropriate cases these covenants "run with the business" so as to give rights to enforce at law.

[37] For cases where there were restrictive clauses but an absence of a general scheme from which the intent to benefit particular lots could be inferred, see Webber *v.* Landrigan, 215 Mass. 221; Dana *v.* Wentworth, 111 Mass. 291.

[38] A mortgagee has sufficient interest. Stewart *v.* Finkelstone, 206 Mass. 28 (where he joined with owners).

[39] See also Mass. Rev. Laws, ch. 96, sec. 7, where a grantee from the Commonwealth may bring proceedings in equity to compel the Harbor and Land Commissioners to enforce certain rights in deeds.

The other land intended to be benefited may be,

1. Expressly named in the deed.

Rogers *v.* Hosegood, L. R. (1900) 2 Ch. 388; Ames 165.

2. Or inferred from the existence of a general building scheme.

Hano *v.* Bigelow, 155 Mass. 341.
Sprague *v.* Kimball, 213 Mass. 380.
Bacon *v.* Sandberg, 179 Mass. 396.

3. Or determined from the fact that the grantor could have had no other idea.

Peck *v.* Conway, 119 Mass. 546; Ames 162 (residence adjoining).

4. Or dependent on the language of a statute, and the attendant circumstances.

Mass. Inst. of Technology *v.* Boston Soc., Nat. Hist. 218 Mass. 189.

This intent is a question of the construction of the instrument in the light of attendant circumstances. In the absence of an intent to benefit other land, an apparent restriction may operate merely as a personal agreement not enforceable by the assigns of the person benefited.

Nottingham Patent Brick & Tile Co. *v.* Butler, L. R. 16 Q. B. D. 778; Ames 169 (rule stated).

Renals *v.* Cowlishaw, 9 Ch. D. 125; Ames 159 (intent to benefit the then *occupant*, not the *land*).

Badger *v.* Boardman, 16 Gray 559 (rule stated).

Lowell Inst. for Sav. *v.* Lowell, 153 Mass. 530, and cases therein cited.

The person who originally creates restrictions

may enforce them for his grantees, although he is no longer interested.

Riverbank Improvement Co. *v.* Bancroft, 209 Mass. 217.

In the case of building restrictions affecting a whole neighborhood, each lot is commonly burdened[40] for the benefit of, and benefited by the burden upon, each other lot, whether previously or subsequently conveyed.

Hopkins *v.* Smith, 162 Mass. 444.

Barrow *v.* Richard, 8 Paige 351; Ames 173.

But a provision intended to be a restriction for the benefit of an entire stranger will not be enforced.

Hazen *v.* Matthews, 184 Mass. 388.

Haverhill Sav. Bank *v.* Griffin, 184 Mass. 419.

Restrictions in favor of land, in order to be enforceable in equity by or against persons other than those originally creating them, must be such as "make for greater pleasure and comfort in the occupation of the neighboring land."

Norcross *v.* James, 140 Mass. 188; Ames 182 (agreement of grantor not to use other land in competition as a quarry not enforced between assigns. Does not run with land at law or in equity).[41]

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[40] The burden will not be implied, however, from the existence of restrictions on adjoining lots. As a matter of practise, a clause by which the grantor agrees similarly to restrict the remaining lots in the tract should be inserted in the deed of one who purchases a restricted lot. McCusker *v.* Goode, 185 Mass. 607; Sprague *v.* Kimball, 213 Mass. 380.

[41] Compare with this, Hodge *v.* Sloan, 107 N. Y. 244; Ames 184, in which case the enforcement by the grantor himself was allowed, against an assignee of the grantee, of a restriction against the sale of sand from the granted land in competition with the grantor. Probably the original party to the contract could have enforced the

Continued on page 140.

It has been held no objection (in Massachusetts, at least) that restrictions require active duties (such as repairing, or even paying money) although, in general, affirmative contracts bind only the covenantor, his heirs, executors and administrators and do not run with the land.

Whittenton Mfg. Co. *v.* Staples, 164 Mass. 319 (payment of money).

Middlefield *v.* Church Mills Knitting Co.,[42] 160 Mass. 267 (an anomalous case).

Contra: Hayward *v.* Brunswick, etc. Society, 8 Q. B. D. 403; Ames 176 (only covenants restricting use of land are enforceable).

When a restriction is once created for the benefit of land, the right to enforce it passes to subsequent owners of the benefited land even though they are ignorant of it or have not contracted for it.

Peck *v.* Conway, 119 Mass. 546; Ames 162.

Restrictions not expressly limited in duration are construed, in the absence of statute, as permanent.

Jackson *v.* Stevenson, 156 Mass. 496; Ames 179.

Mass. Inst. of Technology *v.* Boston Soc. Nat. Hist., 218 Mass. 189 (*dictum*, that restrictions by individual that square should be "reserved from sale forever" would be invalid).

See Mass. Rev. Laws, ch. 134, sec. 20

Continued from page 139

agreement in Norcross *v.* James. Professor Ames says it is not (in Norcross *v.* James) a question of "running with the land" but of public policy how far equity will go in holding assigns to a contract. See collection of cases in 17 Harvard Law Review (Jan. 1904) 175-6.

[42] See comment on this case in Lincoln *v.* Burrage, 177 Mass. at page 380.

(limiting those not otherwise limited, to thirty years).

See Davidson *v.* Sohier 220 Mass. 270 (restriction applying to first house to be built on lot).

But equitable relief by injunction may be refused if the enforcement could have no other effect than to harass and injure the defendant, without effecting the purpose for which restrictions were originally made, or where the plaintiff has been guilty of laches,[43] acquiescence, or the violation of the same restrictions, or where the plaintiff's interest is too remote.

Jackson *v.* Stevenson, 156 Mass. 496; Ames 179 (character of neighborhood wholly changed. Actual damages [44] given, but no injunction).

Stewart *v.* Finkelstone, 206 Mass. 28 (discussion of laches).

Codman *v.* Bradley, 201 Mass. 361 (no laches where work not discovered by plaintiff because done behind high fence; nor is change in use of buildings in neighborhood conclusive).[45]

Loud *v.* Pendergast, 206 Mass. 122 (laches and violation of similar restrictions).

Bacon *v.* Sandberg, 179 Mass. 396 (violation of same restriction by plaintiff).

Johnston *v.* Hall, 2 K. & J. 414; Ames 187 (plaintiff's interest that of reversion after 999 year lease).

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[43] But it is not laches for one to fail to bring a bill if another has brought one seasonably and then settled by selling his land after rescript from the court. Daly *v.* Foss, 199 Mass. 104.

[44] Money damages were here given, although the cause of action was purely equitable and not such as could be maintained at law. See also accrued damages in Childs *v.* B. & M. R. R., 213 Mass. 91.

[45] The maintenance of a building line may be as important for business as for dwelling neighborhood.

In Massachusetts, by statute, land may be freed by the Land Court from restriction, to the extent required by the equities of the case or the public interest. Persons entitled to the benefit of such restrictions may have damages assessed.

Mass. St. 1915, ch. 112.

The mere probability that the character of a neighborhood will change in the near future is no ground for refusing to enforce a restriction.

Evans *v.* Foss, 194 Mass. 513 (garage in residential neighborhood).

A purchaser of a part of a restricted lot of land has no remedy in equity against the owner of the other part of the same lot.[46]

Jewell *v.* Lee, 14 Allen 145.

King *v.* Dickeson, L. R. 40 Ch. Div. 596; Ames 178.

Restrictions, being interests in land, must, under statutes, be declared in writing, and agreements concerning them are within the Statute of Frauds.[47]

Sprague *v.* Kimball, 213 Mass. 380 (an oral agreement not to restrict land not enforced).

Restrictions are not extinguished by non-user for twenty years unless it is accompanied by a use of the

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[46] Of course, the only duty of the lot owner, before division, or his successors after division, is toward the grantor or such persons as possess his estate in the land for the benefit of which the restriction was created. These cases should be distinguished from Sanborn *v.* Rice, 129 Mass. 387, in which an owner of a lot got relief against the owner of another, although their grantor obtained both lots in a single deed imposing restrictions.

[47] There may be an exception in the case of a restriction created by estoppel or implied grant. See Tallmadge *v.* East River Bank, 26 N. Y. 105 (where line of restriction was shown on a plan). See also Sprague *v.* Kimball, 213 Mass. 380.

restricted land inconsistent with the existence of the restriction.

Smith *v.* Price, 214 Mass. 298.

Equitable relief will be refused where substantially all the landowners affected have so conducted themselves as to indicate an abandonment of the right to enforce the restrictions.

Loud *v.* Pendergast, 206 Mass. 122.

But a mere failure to enforce the same restrictions against other violators, does not bar the plaintiff.

Codman *v.* Bradley, 201 Mass. 361 (Tremont St., Boston).

Nor does a mere technical violation by the plaintiff bar his enforcement.

Stewart *v.* Finkelstone, 206 Mass. 28 (plaintiff's building, built fifty years before, had an ell contrary to restrictions).

But entrenchment behind considerable expenditure of money cannot shield premeditated efforts to evade or circumvent the obligation of restrictions.

Stewart *v.* Finkelstone, 206 Mass. 28.

D. Statute of Frauds — Part Performance.

The Statute of Frauds[48] requires that all contracts concerning land, in order to be enforceable, shall be in writing.[49]

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[48] There are other statutes which should be distinguished from the Statute of Frauds, such as those requiring that the creation or transfer of all interests in land shall be in writing (see Mass. Rev. Laws, ch. 127, sec. 3). These statutes usually except such interests as are created by operation of law, such as constructive and resulting trusts.

[49] For a discussicn of the requirements of the statute as to the nature of the written memorandum, as to the time of performance where contract is silent on this point, and as to the non-necessity for the plaintiff's signing the memorandum, see Nickerson *v.* Bridges, 216 Mass. 416. An oral promise to sign a written agreement is within the statute. Sarkisian *v.* Teele, 201 Mass. 596.

See Mass. Rev. Laws, ch. 74, sec. 1.

But such contracts, though oral, if partly performed by the party seeking the remedy, may in equity be specifically enforced notwithstanding the statute.[50] The ground of enforcement is the equitable fraud[51] that would result from allowing the statute to be a bar, or the equitable estoppel of the defendant to set up the statute.

Hubbell *v.* Warren, 8 Allen 173.

The acts of part performance must

1. Have been by the party seeking the remedy.
   Barnes *v.* B. & M. R.R., 130 Mass. 388.
2. Have been in pursuance of a contract and such as to alter the relations of the parties.
   Graves *v.* Goldthwaite, 153 Mass. 268 (performance of a collateral contract not sufficient).
   Burns *v.* Daggett, 141 Mass. 368; Ames 284.
3. Unequivocally, without parol assistance, point to the existence of the particular contract.

So the conveyance of one parcel is not evidence of an agreement to convey any interest in an adjoining tract.

Glass *v.* Hulbert, 102 Mass. 24 (fee in another tract).[52]

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[50] This doctrine is wholly repudiated in several of the southern states. It has no application, in Massachusetts, to agreements to sell personalty. But an entire agreement including realty and personalty is within the Statute of Frauds and delivery of the personalty does not constitute part performance. Sarkisian *v.* Teele, 201 Mass. 596.

[51] The mere non-performance of an oral contract where no relation of trust and confidence exists, is not such fraud. Sprague *v.* Kimball, 213 Mass. 380 (and cases cited). Montacute *v.* Maxwell, 1 P. Wms. 618; Ames 274.

[52] See page 145 for note 52.

Sprague *v.* Kimball, 213 Mass. 380 (an equitable interest in another tract).

The mere payment of money[53] is not such evidence.

Glass *v.* Hulbert, *supra.*

Pengall *v.* Ross, 2 Eq. Abr. 46; Ames 276.

Nor is the delivery of other alleged consideration unequivocal evidence.

Barnes *v.* B. & M. R.R., 130 Mass. 388 (failure to sue for damages for taking of location).

Smith *v.* Hatch, 46 N. H. 146; Ames 277 (conveyance of one lot no evidence of contract to exchange).

Bigelow *v.* Ames, 108 U. S. 10 (enforcement of oral contract to exchange where conveyance of one parcel and possession of other).

Maddison *v.* Alderson[54] L. R. 8 App. Cases 467; Ames 295 (performance of services no evidences of contract to convey land).

4. Include a change of possession[55] from agreed

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[52] This case should be clearly distinguished from Williams *v.* Carty, 205 Mass. 396, where an oral agreement to convey the "Ephraim Hatch" farm was held to contemplate the including of a parcel not in the deed.

[53] There is an adequate remedy at law where money has been paid but no deed received; but if improvements have been made in the property there is no adequate remedy but is technical liability for trespass.

[54] See various other cases in accord and *contra*, in note, Ames 303.

[55] In Glass *v.* Hulbert, the entry for the purpose of possession was thought to be no more extensive in its operation than the description contained in the deed, because the description in the deed corresponded with the agreement, the alleged fraud touching the agreement and not the deed. In Williams *v.* Carty, the fraud related only to the deed. The agreement is alleged to have been for the sale of a unit of real estate, namely, the Hatch farm, of which the omitted lot was but a fraction. The allegation in the bill that the plaintiff took possession of the entire farm was held to mean the entire tract orally agreed upon.

vendor to vendee or agreed lessor to lessee, with the knowledge or consent of the agreed vendor or lessor.

Barnes *v.* B. & M. R.R., 130 Mass. 388.

Traveler Shoe Co. *v.* Koch, 216 Mass. 412 (agreement to lease).

The continued possession of a tenant is not such a change, because equally consistent with tenancy at will, but the payment of increased rent or the making of extensive repairs by a tenant at the expiration of his lease may be evidence of a new lease.

Wills *v.* Stradling, 3 Vesey 398; Ames 291.

Mundy *v.* Jolliffe, 5 Mylne & Craig 167; Ames 289.

This change of possession should be while the agreed vendor owns the property, not before.

Kaufman *v.* Cook, 114 Ill. 11; Ames 309*n*.

In some jurisdictions (including Massachusetts and the Federal Courts), in addition to the foregoing change of possession there must ordinarily be such expenditures for improvements known (or presumed to be known) to the agreed vendor, or such other change of situation, that adequate compensation can only be made by conveyance.

Potter *v.* Jacobs, 111 Mass. 32 (house built before deed passed).

Burns *v.* Daggett, 141 Mass. 368; Ames 284 (the above rule laid down).

Perkins *v.* Perkins, 181 Mass. 401.

Williams *v.* Carty, 205 Mass. 396 (change of situation, without improvements).

In some other jurisdictions the change of possession, if made with the acquiescence of the agreed vendor or

lessor need not be accompanied by improvements.[56]

Butcher *v.* Stapely, 1 Vernon 363; Ames 279.

Ungley *v.* Ungley, L. R. 5 Ch. D. 887; Ames 281 (consideration of marriage).

The doctrine of part performance applies to agreements to convey easements, and to give leases.

Barnes *v.* B. & M. R.R., 130 Mass. 388.

E. India Co. *v.* Vincent, L. R. 35 Ch. D. 694; Ames 310.

Harrell *v.* Sonnabend, 191 Mass. 310 (agreement to give a lease).

Traveler Shoe Co. *v.* Koch, 216 Mass. 412 (agreement to give a lease).

An agreement to make a gift may be enforced, if there has been part performance.

Seavey *v.* Drake, 62 N. H. 393; Ames 308.

Apart from the doctrine of part performance, there may be specific performance of an oral contract where there is antecedent fraud, resulting in the substitution of a fictitious agreement.

Mullet *v.* Halfpenny, Prec. in Ch. 404; Ames 315.

Peek *v.* Peek, 77 Cal. 106.

E. Partial Performance.[57]

Where there is a slight deficiency in quantity or quality, or a small incumbrance on the property, specific performance is sometimes decreed in favor of the vendor, with an allowance to the agreed vendee for the defects.

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[56] Except in a few jurisdictions (as by statute in Alabama) the payment of the purchase money does not seem to be an essential prerequisite for a bill for enforcement by vendee.

[57] Because of the similarity of name, careful distinction should be made between this doctrine and that of *Part* Performance.

Dyer *v.* Hargrave, 10 Vesey, 505; Ames 245.
Mansfield *v.* Wiles, 221 Mass. 75.

The agreed vendee may usually have specific performance with compensation for what the seller cannot give him, provided the agreed vendee supposed at the time of the contract that the seller could convey all.

Pingree *v.* Coffin, 12 Gray 288.
Tobin *v.* Larkin, 183 Mass. 389.

But the agreed vendee may not have such relief where the agreement stipulates that the contract shall end if the agreed vendor cannot furnish a good title.

Old Colony Trust Co. *v.* Chauncey, 214 Mass. 271.

F. Time the Essence of the Contract.

Where a certain time is fixed in the contract for performance, equity[58] ordinarily treats the provision as formal rather than essential and permits one to compel performance by the other, notwithstanding his own slight delay.

Barnard *v.* Lee, 97 Mass. 92.
Parkin *v.* Thorold, 16 Beavan 59; Ames 327.
Mansfield *v.* Wiles, 221 Mass. 75.

Equity commonly requires, however, in such a case that the party seeking the remedy shall have been "able and willing" to complete his contract substantially at the time specified. The circumstances of each case will be considered.

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[58] The rule as to when a contract must be performed is not the same at law as in equity. At law it must be performed within the time specified in the contract or, if no time is specified, within a reasonable time. If not then performed it may be rescinded by either party. In equity, unless time is made "of the essence of the contract," the agreement need not be performed within the time specified. Mansfield v. Wiles, 221 Mass.75.

Pomeroy, sec. 1408.

Thaxter *v.* Sprague, 159 Mass. 397 (Offered to perform, several months late. Enforcement refused).

Barnard *v.* Lee, 97 Mass. 92 (Contract stipulated payment on April 1; tender made May 25, vendee being in meantime in possession, though not ready. Enforced).

A failure to make a tender of performance[59] at the agreed date, if time is not of the essence of the contract, and the defendant has repudiated the contract, will ordinarily not prejudice the plaintiff beyond the payment of costs.

Tobin *v.* Larkin, 183 Mass. 389.

Rutherford *v.* Haven, 11 Iowa 587; Ames 342.

Staples *v.* Mullen, 196 Mass. 132 (bill by agreed vendor).

It is better practise, however, always to make a tender, as it is sometimes a close question whether or not the other party has repudiated the contract.

Smith etc. Co. *v.* Canady, 213 Mass. 122 (facts held not to be a repudiation).

Time may, however, be made "of the essence of a contract," in which case a failure to perform or to tender performance at the time agreed upon may result in a loss of the right to compel the performance of the other party. For the general rule, see

Barnard *v.* Lee, *supra*, and cases cited.

Boston & Worcester St. Ry. Co. *v.* Rose, 194 Mass. 142.

The time of performance may thus be made "of

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[59] A strict tender need not be made. It is sufficient if when the time comes the agreed vendee is able and prepared to pay and demands the deed. Cole *v.* Killam, 187 Mass. 213.

the essence[60] of the contract,"

a. By express stipulation to that effect.

Garcin *v.* Penn. Furnace Co., 186 Mass. 405 (contract stipulated forfeiture of money and all rights if purchase not completed at date specified).

Lloyd *v.* Rippingale, 1 Younge & Collyer, Exchequer 410; Ames 335.

Heckard *v.* Sayre, 34 Ill. 142; Ames 340.

But see Barnard *v.* Lee, *supra*.

b. By the nature of the subject matter.

Carter *v.* Phillips, 144 Mass. 100 (a going business).

Goldsmith *v.* Guild,[61] 10 Allen 239 (real estate of fluctuating value).

c. By reason of the surrounding circumstances.

Tilley *v.* Thomas, L. R. 3. Ch. App. 61; Ames 336. (vendee desired to use property at time specified).

Where time is of the essence of the contract, the American rule is that the vendee loses what he has paid in, and all improvements if he fails to complete the contract at the agreed time.

Keefe *v.* Fairfield, 184 Mass. 334.

Heckard *v.* Sayre, 34 Ill. 142; Ames 340.

The English rule is *contra*.

Vernon *v.* Stephens, 2 P. Wms. 66; Ames 338.

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[60] The foregoing methods of making time "of the essence of a contract" are those set forth by Lord Justice Turner in Roberts *v.* Berry, 3 D., M., & G. 284. See more elaborate statements in Barnard *v.* Lee, *supra*.

[61] This case occurred during the Civil War. The principal fluctuation seems to have been in the gold market.

The failure of an agreed vendee to appear at a tender or to offer explanation of his failure is equivalent to an absolute refusal on his part to perform and a waiver of his right to object to certain features of vendor's title, when sued at law for damages.

Sleeper *v.* Nicholson, 201 Mass. 110 (a contract case).

G. Marketable Title.

In order to maintain a bill for specific performance, an agreed vendor must show his title good beyond a reasonable doubt.

First A. M. E. Society *v.* Brown, 147 Mass. 296.

Jeffries *v.* Jeffries, 117 Mass. 184.

Sturtevant *v.* Jacques, 14 Allen 523.

Noyes *v.* Johnson, 139 Mass. 436 (a title by adverse possession held not good here).

Galligan *v.* McDonald, 200 Mass. 299 (in which case title was found good).

A title defective on the records may be marketable if actually good and such as a reasonable purchaser would accept.

Aroian *v.* Fairbanks, 216 Mass. 215.

Unless all persons concerned in an alleged defect are parties to the suit, a court in equity will not determine whether or not a title is actually *good*, but whether or not there is a reasonable *doubt* as to its validity.

Foster etc. Co. *v.* Sayles, 213 Mass. 319.

But if the facts are clear and the dispute is purely a question of law, the court may decide whether or not the title is good, and make a decree accordingly.

Chesman *v.* Cummings, 142 Mass. 65.

It is not necessary that the vendor's title shall have

been good, or that he shall have had any title, at the time the agreement was made, so long as it is good at the date agreed upon for passing papers.

Smith *v.* Greene, 197 Mass. 16.

Dresel *v.* Jordan, 104 Mass. 407.

If the title is not good on the date for conveying, the agreed vendee may terminate his contract, refuse a deed, and recover back any payments he has made, in an action of contract, without previous tender.

Burk *v.* Schreiber, 183 Mass. 35.

If the contract provides that the agreement shall be void if the agreed vendor cannot give a good title, and the title proves to be defective, the agreed vendee has no equitable rights against the agreed vendor.

Old Colony Trust Co. *v.* Chauncey, 214 Mass. 271.

H. Mutuality.

Equity will not ordinarily compel one party to perform a contract if at the time performance is asked the only remedy of the other party is a suit for damage at aw.

Prof. Ames in 3 Columbia Law Rev. 1.

Flight *v.* Bolland, 4 Russell 299; Ames 422 (Relief denied infant seeking to compel adult to convey, for infant having paid money could rescind and recover).

Clayton *v.* Ashdown, 9 Viner's Abr. 393; Ames 421. (But after infant is of age he may enforce).

The rule as sometimes stated is that the contract, to be enforced in equity, must be such that, at the time the bill was brought, it was enforceable by either party.

Putnam *v.* Grace, 161 Mass. 237, at 247.

Norris *v.* Fox, 45 Fed. Rep. 406; Ames 426.

(Plaintiff who had agreed to "procure a warranty deed" for defendant from another, got title and brought bill. No enforcement because defendant could not compel at time of contract.)[62]

The defense has no application to unilateral contracts or to bilateral contracts where the plaintiff has furnished the consideration or offers to do so at the time of performance.

Howe *v.* Watson, 179 Mass. 30; Ames 429.
(Agreement of defendant's intestate to leave all her property to plaintiff, if plaintiff would care for her till death, which plaintiff did. Specific performance).

Smith *v.* Greene, 197 Mass. 16 (agreed vendor need not have a good title at the time agreement is signed).

Nor does it apply where the plaintiff is not bound in writing (in a case within the Statute of Frauds) and but for the offer in his bill could not be held to performance on his part.

Mansfield *v.* Hodgdon, 147 Mass. 304.

Hatton *v.* Gray, 2 Cas. in Ch. 164; Ames 421.

O'Brien *v.* Boland, 166 Mass. 481; Ames 433.
(Option for ten days to buy land, under seal, and therefore an irrevocable covenant; accepted by plaintiff. Enforceable by him).

An agreement enforceable by either party upon its acceptance within a time specified, is not void for want of mutuality.

O'Brien *v.* Boland, 166 Mass. 481.

It is sometimes said that the right of a plaintiff to

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[62] The reason here might well have been that the defendant never could enforce an agreement to procure a warranty deed from another.

enforce specific performance against a defendant in certain cases (as, for example, in the case of a vendor of land against a vendee) is dependent on the defendant's right against the plaintiff and therefore rests on the doctrine of mutuality. This is unsound. The doctrine is really a defense. It is the *lack of mutuality* that defeats the right of action. The true reason affording the remedy is that at law the vendor could recover [63] only the excess of the agreed price over the market value, and his land remains unsold.

Old Colony R.R. *v.* Evans, 6 Gray 25.

I. Necessity and Adequacy of Consideration.

It is ordinarily said that where one agrees to make a gift,[64] though the agreement is under seal or recites a consideration,[65] equity will not enforce it unless there has been such part performance as to require it.

Jefferys *v.* Jefferys, Craig & Phillips 139; Ames 261.

Inadequacy of consideration unless it "shocks the conscience" is not of itself ground for refusing specific performance.

Lord Eldon in Coles *v.* Trecothick, 9 Vesey 234.

Lee *v.* Kirby, 104 Mass. 420.

Nickerson *v.* Bridges, 216 Mass. 416.

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[63] When the vendor has conveyed land, he cannot collect in equity. He is then merely an unsecured creditor. Before, by the doctrine of conversion, he was in a position like that of a mortgagee.

[64] But in Ferry *v.* Stephens, 66 N. Y. 321; Ames 262; a man agreed to sell land to his sister, and she to buy, for $1100; but the consideration was fictitious. He indorsed the receipt of the $1100 on the agreement. He died devising land to another. Held that as parol evidence was not admissible to vary the terms of the original contract, it bound both; and as nothing remained to be done but convey, specific performance was ordered.

[65] As to the enforceableness of an option under seal, where there is no consideration, see O'Brien *v.* Boland (under Mutuality, *supra*).

J. Sundry Defenses, and Incidents of the Remedy.

A bill in equity for specific performance of a contract which equity will enforce is not inconsistent with a suit at law for the same cause, but is alternative. Both affirm the contract. But the plaintiff ultimately may be required to elect between his remedies.

Connihan *v.* Thompson, 111 Mass. 270.

Miller *v.* Hyde, 161 Mass. 472.

It is a good defense to a bill for specific performance that the contract was obtained by mistake, fraud, misrepresentation or concealment.

Kurinsky *v.* Lynch, 201 Mass. 28 (agreed vendor may defend on ground of fraudulent concealment of real purchaser).

Breed *v.* Berenson, 216 Mass. 397 (agreement of attorneys to divide fees not enforced because of representations made as a basis for agreement).

Mansfield *v.* Sherman, 81 Maine 365; Ames 385 (mistake of agreed vendor).

Ames, pps. 351-373.

Such misrepresentations as prevents the plaintiff from coming into a court with clean hands is a bar to relief.

Chute *v.* Quincy, 156 Mass. 189.

Cadman *v.* Horner, 18 Vesey 10; Ames 351.

But such misrepresentations must not be too indefinite.

Scott *v.* Hanson, 1 Simons 13; Ames 353.

In equity, intentional misrepresentation by the plaintiff made for the purpose of deceiving, and relied upon, may be a good defense, though the defendant suffered no damage.

Kelly *v.* Central Pacific R.R. Co., 74 Cal. 557; Ames 355 (damage to a third person).

But in the absence of fraud, the mere fact that the price at which the agreed vendor has contracted to sell is a low one, is no defense.

Nickerson *v.* Bridges, 216 Mass. 416.

If the plaintiff has misrepresented, he cannot enforce in part.

Clermont *v.* Tasburgh, 1 J. & W. 112; Ames 358.

If an agreement has been made by an agent, its specific performance against the alleged principal is dependent on the agent's authority.

Harrigan *v.* Dodge, 216 Mass. 461.

Record *v.* Littlefield, 218 Mass. 483.

If an agreement specifies that property is to be delivered free of tenants, the vendor cannot enforce specific performance if the property is not free of tenants on the date set.

Howe *v.* Conley, 16 Gray 552.

That an agreement does not comply with the requirements of the Statute of Frauds is, of course, a good defense.

See Statute of Frauds — Part Performance (*supra*).

Tobin *v.* Larkin, 183 Mass. 389.

Nickerson *v.* Bridges, 216 Mass. 416.

The absence of a proper tender by the plaintiff may be a good defense.

Smith & Rice Co. *v.* Canady, 213 Mass. 122.

But see Tobin *v.* Larkin, 183 Mass. 389.

The fact that the defendant is not the owner of the real estate in controversy is a matter of defense, when the agreed vendee brings the bill. The plaintiff in such case need not allege the defendant's ownership.

Harrigan *v.* Dodge, 200 Mass. 357.

But unless the plaintiff's bill alleges, in elucidation of an ambiguous memorandum, data identifying property, the bill is demurrable.

Harrigan *v.* Dodge, 200 Mass. 357.

Where one conveys to another on an oral promise to re-convey, the Statute of Frauds is a good defense to a bill for specific performance,[66] but the value of the land may be recovered at law.

Cromwell *v.* Norton, 193 Mass. 291.

See Creedon *v.* Mahoney, 193 Mass. 402.

One who breaks an agreement to buy by failing to pay, cannot recover what he has paid if the other party is ready to perform.

Keefe *v.* Fairfield, 183 Mass. 334.

Where an agreement specifies that on the failure to make certain payments it shall become void, the vendee cannot by default avoid payment. The option is that of the vendor.

Meagher *v.* Hoyle, 173 Mass. 577.

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[66] But if there has been no delivery, the deed may be cancelled as a cloud. Creeden *v.* Mahoney, 193 Mass. 402 (semble).

CHAPTER VIII.

INJUNCTIONS.

A. GENERALLY.

B. RESTRAINING LEGAL PROOCEEDINGS AND JUDGMENTS.

C. RESTRAINING ILLEGAL ACTS OF PUBLIC OR CORPORATION OFFICIALS.

A. GENERALLY.

An injunction is a judicial order, operating *in personam*, requiring a party to do or to abstain from doing a particular act. Injunctions requiring the doing of acts are *mandatory*; those requiring the abstaining from doing acts are *prohibitive*.

An injunction may be either a final remedy or interlocutory relief. In the former case it is a final decree and is perpetual; in the latter it is an interlocutory decree (or an order or writ) usually for the purpose of requiring the subject matter to be preserved *in statu quo* during litigation.

It is fundamental that the restraining power of equity extends through the whole range of rights and duties and would be applied in every case of intended violation were it not for certain reasons of expediency and policy, such as the completeness and adequacy of the legal remedy.

Pomeroy, sec. 1338.

As a rule, American courts will not restrain purely personal torts, without violation of property right. Where no breach of trust or of contract appears, a bill in equity will not lie (in Massahusetts) to enjoin the publication of libelous statements injurious to the plaintiff's business, trade, or profession or which

operate as a slander of his title to property.[1]

Finnish Temperance Soc. *v.* Raivaaja Pub. Co., 219 Mass. 28 (libel).

Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69.

Worthington *v.* Waring, 157 Mass. 421 (as to the right of a former employee to restrain blacklisting. See discussion of the case in Burnham *v.* David, 217 Mass. 35).

Among the principal uses of the injunctive form of decree are

1. To restrain legal proceedings and judgments.

See Section B in this chapter.

2. To restrain illegal acts by public or corporation officials.

See Section C in this chapter.

3. To enforce negative contracts.

See Chapter VII, Sections B and C.

4. To restrain torts.

See Chapter IX.

5. To restrain violation of equitable rights, particularly rights under trusts.

(Not treated in this book. See any text-book on Trusts).

6. To enforce duties created by statute.

7. To preserve (by interlocutory decree) the subject matter of litigation *in statu quo* pending a final decree. This is procedural rather than a matter of substantive law.

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[1] The *contra* appears to be the rule in England. See also Stevens *v.* Rockport Granite Co., 216 Mass. 486, where noise was enjoined as an "invasion of the right to comfortable living."

B. Restraining Legal Proceedings and Judgments.

The restraining of legal proceedings and judgments was one of the first important branches of equity jurisdiction.

See 1 Lord Campbell's Lives of the Chancellors 235, or 1 Hallam's Const. History 472, for full account of contest between equity and law, and its settlement under James I.

Equity interferes with actions or judgments at law only when the complainant has an equitable defense not available at law, or a good defense at law which he was prevented from using through fraud or accident, unmixed with negligence of himself or his agent.

Hendrickson *v.* Hinckley, 17 Howard 443.
Dehon *v.* Foster, 4 Allen 545.
Payson *v.* Lamson, 134 Mass. 593.
Moors *v.* Ladenburg, 178 Mass. 272.
Platt *v.* Woodruff, 61 N. Y. 378.

The necessity for interference in the first of the foregoing classes is largely eliminated by statutes permitting equitable defenses in suits at law.

See Mass. Rev. Laws, ch. 173, secs. 28 and 32; Mass. St. 1913 ch. 307.

But resort to an injunction may be necessary to obtain "equitable set off" of judgments.

Cromwell *v.* Parsons, 219 Mass. 299 (against holder of execution and sheriff to enjoin collection of execution unless plaintiff's claim is set-off).

Omission to present at law some legal defense, and failure to succeed at law through ignorance, negligence or mistake of counsel, are not grounds for equitable interference.

Emerson Udall, 13 Vermont 477.

Payson *v.* Lamson, 134 Mass. 393.

Mayor of New York *v.* Brady, 115 N. Y. 599 at 616.

Ames Cases, 4 (note).

Since equity acts in personam, a court may restrain one within its jurisdiction from prosecuting a suit in another state or country, if he is thereby taking an inequitable advantage of another.

Kempson *v.* Kempson, 58 N. J. Eq. 94; & Ames 26.

Debon *v.* Foster, 4 Allen 545.
(Where A was enjoined from prosecuting an action in another state against B, a Mass. insolvent, whose property there A had attached. This would have operated to prevent property coming to B's Massachusetts assignee).

Sundry cases in note, Ames 28.

But such restraint will not be made simply because the interpretation of the law by the highest court of the other state, relative to the subject matter, is different from that of the Local or the Federal Supreme Court.

Carson *v.* Dunham, 149 Mass. 52.
(General rule that court first getting jurisdiction holds it. Dunham's right to use South Carolina courts was as good as Carson's right to use Mass. or U. S. courts).

The federal courts will not enjoin proceedings in the state courts except under bankruptcy or other special federal statutes, or in order to render effective their own decrees; nor as a rule will one court enjoin proceedings in another of co-ordinate jurisdiction.

Peck *v.* Jenness, 7 How. 612 (cited in

Hill Man. Co. *v.* Prov. & N. Y. S. Co., 113 Mass. 495).

Furnald *v.* Glenn, 64 Fed. Rep. 49.

U. S. *v.* Parkhurst-Davis Mercantile Co., 176 U. S. 317.

Riverdale Cotton Mills *v.* Alabama & G. Mfg. Co., 198 U. S. 188.
(Defendant defeated in the federal courts in Alabama after ten years' fight, brought bill in state court attacking efficacy of decrees of federal court on ground of jurisdiction to which it had already submitted. Federal court enjoined the litigation to make effective its own decree).

Old Dominion Copper Co. *v.* Bigelow, 203 Mass. 159 (see sundry temporary injunctions, in description of proceedings).

U. S. Comp. Stat. 1901, sec. 720.

Injunctions relating to suits at law are directed to the litigants, and not to the judges of the law courts. Although jurisdiction depends on the litigants, the Massachusetts court has restrained a suit between two non-residents concerning subject matter here, by a decree against the plaintiff in the law suit and his agents, with service ordered on his resident attorney.

Moors *v.* Ladenburg, 178 Mass. 272.

Even though the parties have been enjoined from proceeding, a judgment obtained in violation of the injunction is valid at law.

Winston *v.* Westfeldt, 22 Ala. 760; Ames 3.

C. Restraining Illegal Acts of Public or Corporation Officials.

The legal remedy of *quo warranto* is usually sufficient to test the right to a public office or to a

corporation office or membership[2] of one who claims to hold it; and the legal remedy of *mandamus* sufficient to compel the reinstatement of officials improperly removed, to obtain a view of corporation books, and to obtain relief from violations of law.

Varney *v.* Baker, 194 Mass. 239 (mandamus to compel books to be shown).

Andrews *v.* Mines Corporation, 205 Mass. 121.

Aspinwall *v.* Boston, 191 Mass. 441.

Longyear *v.* Hardman, 219 Mass. 405 (mandamus against one acting as director; good general discussion).

Walworth *v.* Cassassa, 219 Mass. 20 (to test town solicitor's office).

The remedies of *mandamus* and *certiorari* are ample where one threatens to perform a statutory duty wrongly.

Moneyweight Scale Co. *v.* McBride, 199 Mass. 503; s. c. 223 U. S. 749.

Equity courts may, however, restrain illegal acts of public or corporation officials where such acts tend to produce irreparable injury, to create a cloud on title[3] or to give rise to multiplicity of suits.

Von Arnim *v.* American Tube Works, 188 Mass. 515 (excessive compensation taken by directors).

Granara *v.* Italian Cath. Cem. Ass'n, 218 Mass. 387 (illegal issuance of shares).

Moneyweight Scale Co. *v.* McBride, 199 Mass. 503 (enjoining action under unconstitutional statute).

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[2] But the unlawful expulsion of a member of a voluntary association may be restrained by injunction.

[3] But not if the remedy by writ of entry is adequate. Preston *v.* Newton, 213 Mass. 483.

Small *v.* Cahoon, 207 Mass. 359 (to restrain removal of church under illegal vote).

Kelley *v.* Sullivan, 201 Mass. 34 (by member of lodge to restrain purchase of land in violation of by-law).

Greene *v.* Fitchburg 219 Mass. 121 (by ice dealer to restrain city from illegally fixing ice prices.)

Pomeroy, sec. 1345 (see note, for collection of cases).

The corporation[4] is the proper plaintiff in such a case; but if sufficient demand has been made on it by a stockholder, or if such a demand if made would obviously be futile, a stockholder may bring suit in his own name.

Brewer *v.* Boston Theatre, 104 Mass. 378.

Bartlett *v.* N. Y., N. H. & H. RR. Co. 221 Mass. 530 (inefficient demand).

Von Arnim *v.* American Tube Works, 188 Mass. 515.

Granara *v.* Italian Cath. Cem. Ass'n, 218 Mass. 387.

The right to restrain illegal appropriations of money by cities and towns does not fall within general equity jurisdiction, but is regulated by statute.

Prince *v.* Crocker, 166 Mass. 347 (attempt to restrain Boston Transit Commission).

Mass. Rev. Laws, ch. 25, sec. 100 (permitting ten taxable inhabitants to apply to enjoin town from illegal expenditure).

Oliver *v.* Gale, 182 Mass. 39 (under Rev. Laws, ch. 25, sec. 100).

Mass. Rev. Laws, ch. 27, sec. 26 (permitting bill to restrain illegal excess of debt limit.)

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[4] Under similar circumstances, a bond holder may sue if the trustee for the bondholders has failed, on request, to act. Young *v.* Haviland, 215 Mass. 120.

CHAPTER IX.

INJUNCTIONS — SPECIFIC REPARATION AND PREVENTION OF TORTS.

A. Waste.

B. Trespass and Disturbance of Easements.

C. Nuisance.

D. Infringement of Patents, Copyrights and Trademarks. Unfair Competition.

E. Interference with Business or Contract.

A. Waste.

Waste is an unreasonable or improper use, abuse, mismanagement, or omission of duty, touching real estate, by one rightly in possession thereof, which results in substantial injury.

Delano *v.* Smith, 206 Mass. 365 (general discussion of waste).

Pynchon *v.* Stearns, 11 Met. 304 (acts do not amount to actionable waste unless "prejudicial to the inheritance," etc.)

At common law[1] one immediately entitled to an estate of inheritance (but no other) might have a

[1] The common law jurisdiction has been extended by statute in Massachusetts so as to afford relief to persons having the next immediate estate of inheritance or remainder, or reversion in fee simple or fee tail, after an intervening estate for life, and to a remainderman or reversioner for life or for years against a tenant in dower, by curtesy, for life or for years. Rev. Laws, ch. 185. And the statute gives one treble damages for waste by a co-tenant or joint tenant, who has not given thirty days' notice. It is held not to apply, however, where the defendant claims sole ownership. Jenkins *v.* Wood, 145 Mass. 494.

remedy by an action of waste, as in the case of a landlord against his tenant.

Pomeroy, sec. 1348.

But waste may be restrained in equity though the plaintiff has an estate less than an estate of inheritance.[2]

Mollineaux *v.* Powell, 3 P. Wms 268; Ames 468. (by tenant for life).

Delano *v.* Smith, 206 Mass. 365 (by mortgagee).

And cases cited *infra.*

And in general the basis of relief in waste is the irreparable injury to the property concerned.

Attaquin *v.* Fish, 5 Met. 140 (good discussion, but no remedy on facts).

Clark *v.* Holden, 7 Gray 8 (cutting timber may be waste, though to do so is good husbandry).

Delano *v.* Smith, 206 Mass. 365 (use as small-pox hospital may be).

Hawley *v.* Clowes, 2 Johns Ch. 122; Ames 484 (cutting timber).

Small *v.* Cahoon, 207 Mass. 359 (removal of building).

Whitfield *v.* Benit, 2 P. Wms 240; Ames 460 (taking minerals).

Peters *v.* Stone, 193 Mass. 179 (to restrain removal of poultry building claimed by defendant as personalty).

Poerther *v.* Russell, 33 Wisc. 193 (removal of mill machinery).

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[2] Pomeroy says an injunction will lie in nearly all cases where a legal action would lie to recover possession of land wasted, or to obtain damages. Pomeroy, sec. 1348. It lies between co-tenants. Hawley *v.* Clowes, 2 Johns. Ch. 122; Ames 484.

Brock *v.* Dole, 66 Wisc. 140 (erecting chimney).

Baugher *v.* Crane, 27 Md. 36 (changing character of building).

Cannon *v.* Barney, 59 Miss. 289 (dismantling ginhouse).

West Ham Board *v.* E. London Co., (1900) 1 Ch. 624 (covering land with rubbish).

In some jurisdictions non-payment of taxes by a tenant for life is waste. In Massachusetts, the neglect of a life tenant to insure is not waste, however.

Stetson *v.* Day, 51 Maine 434.

Harrison *v.* Pepper, 166 Mass. 288 (neglect to insure).

A common application of the equitable remedy[3] for waste is in decrees upon bills brought to restrain mortgagors from impairing the property mortgaged.[4]

Thompson *v.* Heywood, 129 Mass. 401.

Brady *v.* Waldron, 2 Johns. Ch. 148; Ames 483.

Equity may enjoin waste though the property is held by a life tenant "without inpeachment of waste."

Attaquin *v.* Fish, 5 Met. 140.

But equity will not ordinarily enjoin

a. "Permissive" waste; i. e. mere neglect to repair.

Castlemain *v.* Craven, 22 Viner's Abr. 523; Ames 466.

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[3] For a full discussion of cases in which equity will protect and enforce legal rights in real estate, see Hart *v.* Leonard, 42 N. J. Eq. 416; Ames 549.

[4] But the mortgagee has a remedy at law in trover against the mortgagor, or one who takes from him, to recover damages for portions of the property that have been wrongfully severed and converted. Searle *v.* Sawyer, 127 Mass. 491. But see Southbridge Savings Bank *v.* Mason, 147 Mass. 500 (in equity).

b. A technical waste with little or no damage.
Mollineaux *v.* Powell, 3 P. Wms. 268; Ames 468.

c. "Ameliorating" waste. A technical waste which improves the inheritance.
Doherty *v.* Allman, L. R. 3 App. Cases 709; Ames 462 (a tenant altered storehouses to dwellings to suit changed character of neighborhood).
Pynchon *v.* Stearns, 11 Met. 304 (opening ways, digging drains, erecting houses, etc.)

Nor will equity enjoin the mere injuring of the reputation of property.
Delano *v.* Smith, 206 Mass. 365.

Equity having obtained jurisdiction to enjoin against waste will ordinarily award damages also.
Pomeroy, sec. 237.
In re Leeds Woolen Mills, 129 Fed. Rep. 922.

B. Trespass.

Trespass is a wrongful interference with the possession of property by one not in possession, or not rightfully in possession.[5]

Equity will not restrain a single act of trespass to property, temporary in nature and resulting in only nominal damage.
Gates *v.* Johnston Lumber Co., 172 Mass. 495; Ames 520 (to restrain purchaser from removing bricks from plaintiff's land later than agreed time).

But if the act threatened is such as to destroy the

[5] The jurisdiction in equity to enjoin in the case of trespass is a recent development. There are few reported cases prior to 1800. For growth of the jurisdiction, see cases in Ames, pp. 486-499, especially Lowndes *v.* Beetle, 33 L. J. Ch. 451; Ames 499.

property or to cause irreparable damage, then equity will restrain it.

Richards *v.* Dower, 64 Cal. 62; Ames 517 (tunneling under land).

Erhardt *v.* Boaro, 113 U. S. 537; Ames 507 (taking ores from mine).

Lowndes *v.* Beetle, 33 L. J. Ch. 451; Ames 499 (cutting timber).

Echelkamp *v.* Schrader, 45 Mo. 505; Ames 511 (removal of building).

If there has been repetition of an act of trespass and further repetition is threatened, although the act is one resulting in only nominal damage, there may be an injunction so as to avoid repeated actions at law.[6]

Boston & Maine R.R. *v.* Sullivan, 177 Mass. 230 (repeated trespass by hackman).

So, too, a trespass, continuous in its nature, may be enjoined.

Szathmary *v.* B. & A. R.R. Co., 214 Mass. 42 (abutment wall).

Goodson *v.* Richardson, L. R. 9 Ch. App. 221; Ames 502 (laying pipes through land).

Wheelock *v.* Noonan, 108 N. Y. 179; Ames 527 (mandatory injunction to compel removal of large pile of stone from plaintiff's land)[7]

Tucker *v.* Howard, 128 Mass. 361; Ames 548 (obstruction of plaintiff's way by wall of building).

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[6] When an injunction is asked for on this ground, it is true in most jurisdictions that irreparable damage need not be an element, except so far as it is implied from the repeated assaults upon one's rights.

[7] But there will be no injunction to restrain one from trespassing, to remove his own property. Gates *v.* Johnston Co., 172 Mass. 495; Ames 520.

The projection of a structure over another's line is a continuing trespass. An injunction against its continuance is granted,[8] notwithstanding the hardship to the defendant and in spite of only nominal damage to the plaintiff. Otherwise the wrongdoer might deprive the other of his land without his consent or obtain as easement therein.[9]

Tucker *v.* Howard, 128 Mass. 361; Ames 548.

Curtis Mfg. Co. *v.* Spencer Wire Co., 203 Mass. 448 (disproportionate expense to defendant no defense).

Milton *v.* Puffer, 207 Mass. 416.

Kershishian *v.* Johnson, 210 Mass. 135.

Szathmary *v.* B. & A. R.R. Co., 214 Mass. 42 (railroad abutment a few inches over line).

Brooks *v.* Rosenbaum, 217 Mass. 172 (foundation stones. Relief against tenant, who put them there, but not against owner of building).

But in such cases where there is extreme hardship to a defendant innocent of wrongful intent, an injunction may be refused where the plaintiff's interest is a short tenancy and he suffers only nominal damage.

Lynch *v.* Union Inst. for Sav., 158 Mass. 394 (expensive vaults built by defendant over few feet of premises leased by plaintiff).

Brande *v.* Grace, 154 Mass. 210 (structure

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[8] In Brooks *v.* Rosenbaum, 217 Mass. 172, there was a decree against a tenant who had built over the line, ordering him to remove the foundation or pay certain damages. As the plaintiff did not appeal from the decree, it was thus allowed to stand. See this case also for a discussion of the right to relief against the owner of the reversion, where the tenant builds over the line.

[9] This would be unconstitutional. These abutment cases are sometimes classed under nuisance rather than trespass. The Massachusetts Supreme Court uses both designations. See Curtis Mfg. Co. *v.* Spencer Wire Co., cited in text.

cutting off show-windows of short term tenant).

Harrington *v.* McCarthy, 169 Mass. 492 (foundations of building).

Hunter *v.* Carroll, 64 N. H. 572; Ames 529 (two houses innocently built over disputed line on strip worth ten dollars. No injunction unless defendant refused to pay plaintiff fifteen dollars for the land).

One may not ordinarily have an injunction against a defendant in possession in order to remove a cloud from a title or to recover land, a writ of entry being sufficient; although if a suit at law is pending a temporary injunction may issue, restraining injury to the property.

Preston *v.* Newton, 213 Mass. 483.

Deere *v.* Guest, 1 Mylne & Craig 516; Ames 492.

Erhardt *v.* Boaro, 113 U. S. 537; Ames 507.

Indeed, where the title to real estate is in dispute it has been held that in order that the plaintiff may prevail in equity it must appear that he has caused his rights to be determined at law, or that the defendant is insolvent, or that the plaintiff would be injured unless the relief is granted.

Washburn *v.* Miller, 117 Mass. 376; Ames 515 (defendant claimed right of way over plaintiff's property).

Slater *v.* Gunn, 170 Mass. 509 (extending Washburn *v.* Miller).

Hart *v.* Leonard, 42 N. J. Eq. 416; Ames 549 (good discussion).

The modern tendency, however, is to enlarge the jurisdiction of equity in such cases.

Boston & Maine R.R. *v.* Sullivan, 177 Mass. 230.

Goodson *v.* Richardson, L. R. 9 Ch. App. 221; Ames 502.

Billings *v.* Mann, 156 Mass. 203.

A tenant in common may have a stranger restrained from trespass.

Preston *v.* West's Beach Corp'n, 195 Mass. 482 (house built on beach).

If the defendant (by demurrer) admits the title of the plaintiff, an injunction against continuing trespass may issue, especially if the defendant is financially irresponsible.

Hodgson *v.* Duce, 2 Jur. (n. s.) 1014; Ames 523.

Slater *v.* Gunn, 170 Mass. 509 (where defendant is insolvent).

Disturbance of a private[10] *easement* by the erection of structures narrowing or impairing it may be enjoined, under principles similar to those in trespass.

Crabtree *v.* Miller, 194 Mass. 123 (to restrain locking a gate on a way).

Tucker *v.* Howard, 128 Mass. 361; Ames 548 (no preliminary injunction, but on final decree, after completion, defendant compelled to remove wall).

O'Brien *v.* Goodrich, 177 Mass. 32.

Kendall *v.* Hardy, 208 Mass. 20.

Frost *v.* Jacobs, 204 Mass. 1 (building projected eight feet above surface).

The defendant will not be allowed to escape with damages by offering to built a better way.

Downey *v.* Hood, 203 Mass. 4.

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[10] In case the easement disturbed is public, the attorney general may be the proper person to bring the bill.

If the damages are nominal and the hardship[11] to the defendant so great as to be inequitable or oppressive, or if the injury is slight while to restore things would entail a great loss on the defendant, or if there is laches in enforcing the remedy, a mandatory injunction may be refused.

Starkie *v.* Richmond, 155 Mass. 188 (injunction refused after nine years, the damage being waived).

Levi *v.* Worcester Consol. Ry., 193 Mass. 116 (court ordered substitute way offered by defendant, or, if rejected, damages for permanent loss of the way).

Where enjoyment of light and air is an easement, its disturbance may be enjoined. There is no such easement in Massachusetts, except by grant or reservation.

Lipsky *v.* Heller, 199 Mass. 310 (bill to restrain violation of rights in an "open court").

Ames, pp. 534-543 (for English cases on such easements).

Mass. Rev. Laws. ch. 130, sec. 1 (no such easement by prescriptive use).

Duncan *v.* Goldthwaite, 216 Mass. 402 (defendant owning both sides of way, bridged across).

Raynes *v.* Stevens, 219 Mass. 556 (no implied casement of light and air in rear of store hired).

Equity may in an appropriate case enjoin trespass to personalty.

Watson *v.* Sutherland, 5 Wallace 74; Ames 531 (threatened levy against chattels claimed by one not the defendant).

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[11] But see Koehl *v.* Burrell, 11 Ch. Div. 140 (expensive building ordered removed; no laches).

C. Nuisance.[12]

Nuisance results from the conduct of one's property or of one's self in such a manner as to injure another to an extent contrary to public policy. Relief from nuisance is commonly sought in equity when the nuisance is of a continuing kind.

Some examples[13] of nuisances are:

Pollution of air by smoke or smell, except in territory commonly given over to such use (and it is no defense that others caused part of the pollution).

Thorpe *v.* Brumfitt, L. R. 8. Ch. App. 650; Ames 547.

Cf. Downing *v.* Elliot, 182 Mass. 28.

Georgia *v.* Tennessee Copper Co., 237 U. S. 474 (gases injuring vegetation in adjoining state.)

Escape of sand and acids on tenant below.

Boston Ferrule Co. *v.* Hills, 159 Mass. 147.

Noise[14] of machinery.

Stevens *v.* Rockport Granite Co., 216 Mass. 486.

Odors from restaurant.

Campbell *v.* Seaman, 63 N. Y. 568.

Vaughan *v.* Bridgham, 193 Mass. 392.

Escaping water.

Drake *v.* Taylor, 203 Mass. 528.

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[12] It is difficult to make an exact definition of nuisance or classification of nuisance cases. Cases of the kind now classed as Interference with Business were formerly called Nuisance (see Sherry *v.* Perkins, 147 Mass. 212), and the Massachusetts court calls encroachment by abutments both trespass and nuisance (see Curtis Mfg. Co. *v.* Spencer Wire Co., 203 Mass. 448).

[13] See other examples collected in Ames 611, note.

[14] For noise to amount to a nuisance, it must be harmful to the health or comfort of ordinary people and an "invasion of the right to comfortable living." Whether a certain amount of noise is, under the circumstances, a nuisance is usually a question of fact. Stevens *v.* Rockport Granite Co., 216 Mass. 486.

Stoppage of brook.

Melrose *v.* Cutter, 159 Mass. 461.

Hittinger Fruit Co. *v.* Cambridge, 218 Mass. 220.

Pollution of waters.

McNamara *v.* Taft, 196 Mass. 597.

Merrifield *v.* Lombard, 13 Allen 16.

Parker *v.* American Woolen Co., 195 Mass. 591.

But some pollution may be reasonable.

Middlesex Co. *v.* McCue, 149 Mass. 103 (fertilizer).

Downing *v.* Elliot, 182 Mass. 28 (soft coal in greenhouse injuring ice).

The use of property so that its appearance is offensive to the eye is conmonly not held to be nuisance.

Lane *v.* Concord, 70 N. H. 485.

Formerly, in England, to obtain a permanent injunction in equity for nuisance one must first succeed at law.[15]

Weller *v.* Smeaton, 1 Brown's Chanc. 572; Ames 554.

If the plaintiff's right and the defendant's wrong are clear, equity will now grant a permanent injunction against nuisance without a prior action at law. Otherwise, it may temporarily enjoin until legal proceedings are had.

Merrifield *v.* Lombard, 13 Allen 16 (polluting a stream).

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[15] Since upon the plaintiff's success at law he was entitled as of course to an injunction in equity restraining the nuisance (Bemis *v.* Upham, 13 Pick. 169; Hill *v.* Sayles, 12 Cush. 454) the Massachusetts statutes now allow the Superior Court, at law, to issue (in addition to an execution) a warrant to an officer to abate the nuisance at the expense of defendant, or the court of law may even enjoin. Mass. Rev. Laws, ch. 186, secs. 1-5.

Woodward *v.* Worcester, 121 Mass. 245 (diversion of stream).

The equitable jurisdiction is sometimes said to be for the purpose of avoiding a multiplicity of suits.

Stevens *v.* Rockport Granite Co., 216 Mass. 486.

A public nuisance is an injury to the property or rights of that part of the public that comes within its sphere of operation. The attorney general should bring the bill in this case. An individual may not.

Brainard *v.* Conn. River Ry. Co., 7 Cush, 506.

Attorney General *v.* Fitzsimmons, 35 American Law Register, 100; Ames 622. (fight)

Dwyer, *v.* N. Y., N. H. & H. R.R., 209 Mass. 419 (flow of creek diminished by grade crossing changes).

Eaton *v.* Locke, 202 Mass. 324.

Examples:

1. Obstruction of highways and. waterways.

   Dwyer *v.* N. Y., N. H. H,& R.R. 209 Mass. 419.

2. Affecting the public health.

   Attorney General *v.* Hunter 1 Devereux Eq. 12; Ames 621.

   Attorney General *v.* Jamaica Pond Aqueduct 133 Mass. 361.

3. Affecting the public morals.

   Attorney General *v.* Fitzsimmons, 35 Am. Law Reg. 100; Ames 622.

   Carleton *v.* Rugg, 149 Mass. 550.

4. Statutory.

   Attorney General *v.* Williams, 174 Mass. 476.

But an individual may have restraint of a public nuisance if it is also a private nuisance as to him in

that his injury is different in kind, not merely in degree, from that of the rest of the public.

Robinson *v.* Brown, 182 Mass. 266 (public nuisance not private, altho obstruction to highway in front of plaintiff's premises).

French *v.* Conn. River Lumber Co., 145 Mass. 261. (Public nuisance, also private; a boom of logs in river near plaintiff's wharf).

Eaton *v.* Locke, 202 Mass. 324.

In some cases a nuisance may be enjoined on the suit of a city or town or even of a state.

Taunton *v.* Taylor, 116 Mass. 254.

Melrose *v.* Cutter, 159 Mass. 461 (where town was responsible for care of drain).

Springfield *v.* Conn. River R.R., 4 Cush. 63 (railroad in highway).

Rockport *v.* Elwell, 219 Mass. 287 (to enjoin pollution of city water supply, under statute).

Georgia *v.* Tennessee Copper Co., 237 U. S. 474 (to enjoin noxious gases from adjoining state).

The lessor of property or any owner of a reversionary interest may have an injunction only upon proof that there will otherwise be an irreparable damage to the reversion.

Atkins *v.* Chilson, 7 Met. 398.

Parker *v.* American Woolen Co., 195 Mass. 591.

Because the enjoining of a nuisance is a matter of right, no amount of delay, short of the time necessary for the acquirement of a prescriptive right, will, in the absence of estoppel, prevent one from maintaining his action in equity to restrain the commission of a nuisance or a trespass.

Galway *v.* Metropolitan Elevated Ry. Co., 128 N. Y. 132; Ames 600.

Pomeroy, sec. 817.

An injunction may be refused where the nuisance is occasional or temporary, or the injury is past.

Swaine *v.* Great Northern Ry. Co., 4 De Gex Jones & Smith 211; Ames 569 (occasional dead cat in refuse pile).

Kenney *v.* Consumers' Gas Co., 142 Mass. 417.

In granting temporary injunctions the court will consider the relative hardship to the parties. Upon a final decree, if the plaintiff has established a case of permanent nuisance, the court cannot weigh the advantages, since the injunction is a matter of right and is granted even though the damages are nominal.[16]

McNamara *v.* Taft, 196 Mass. 597 (plaintiff's farm of small value compared with defendant's mill).

Mann *v.* Willey, 51 N. Y. App. Div. 169; Ames 572 (pollution by sewage, not noticeable to smell or sight, in water not yet used for drinking purposes; decree for plaintiff).

Brookline *v.* Mackintosh, 133 Mass. 215.

Melrose *v.* Cutter, 159 Mass. 461 (no actual damages proven).

Hennessy *v.* Carmony, 50 N. J. Eq. 616; Ames 578.

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[16] In the matter of injunctions commonly granted as of right, there are cases where on the question of permanently enjoining, the relative hardships were considered by the court and the decree refused. Daniels *v.* Keokuk Water Co., 61 Iowa 549; Ames 585 (soft coal nuisance); Richards Appeals, 57 Penn. 105; Ames 574 (soft coal nuisance). That plaintiff's bill was in the nature of a holdup prevented a decree in Edwards *v.* Allouez Mining Co., 38 Mich. 46; Ames 608.

If the plaintiff sustains in equity his right to a permanent injunction for a nuisance, he may be entitled to damages to date; and if there has been some change since the filing of the bill that would make an injunction ineffective, he may have damages.

Potter *v.* Howe, 141 Mass. 357.

Lexington Print Works *v.* Canton, 171 Mass. 414.

Case *v.* Minot, 158 Mass. 577.

As there is no such thing as an equitable nuisance, laches not amounting to a prescriptive right is no defense, but may be considered in granting preliminary injunctions, or in granting permanent injunctions until after a suit at law.

Galway *v.* Metropolitan Elevated Ry. Co., 128 N. Y. 132; Ames 600.

Dana *v.* Valentine, 5 Met. 8.

But a prescriptive right to maintain a private nuisance may be gained by the statutory period.

Dana *v.* Valentine, 5 Met. 8.

New Salem *v.* Eagle Mill Co., 138 Mass. 8.

In the case of a public nuisance no prescriptive right can be gained.

Attorney General *v.* Revere Rubber Co., 152 Mass. 444.

In the case of pollution amounting to a nuisance, it is sometimes immaterial that the pollution does not interfere with the present use of plaintiff's property.[17]

Parker *v.* American Woolen Co., 195 Mass. 591.

But see Dana *v.* Valentine, 5 Met. 8 (where

[17] Actual damages need not be shown in a suit at law, where a party's right of property is invaded. Bolivar Mfg. Co. *v.* Neponset Mfg. Co. 16 Pick. 247.

relief was not afforded owners of vacant lots, from smells).

It is immaterial to the plaintiff's right to relief that he acquired his property knowing that the defendant was maintaining a nuisance.

Boston Ferrule Co. *v.* Hills, 159 Mass. 147.

It is no defense that third persons are in part responsible for the results complained of.

Parker *v.* American Woolen Co., 215 Mass. 176.

But if one has let a building with full knowledge of the lessee's business, he is not entitled to have him enjoined from doing what is necessarily incident to the conduct of that business. He will be left to his legal remedy, if any.

Browne *v.* Niles, 165 Mass. 276.

The legislature may change the common law of nuisances by adding to or taking from its operation certain acts.[18]

Rideout *v.* Knox, 148 Mass. 368 (spite fence; under Rev. Laws, ch. 33, sec. 19).

Sawyer *v.* Davis, 136 Mass. 239 (ringing factory bell. See Rev. Laws, ch. 106, sec. 9).

If a license to conduct a business complained of has been granted by a competent public body, duly authorized by the legislature, the business will not be enjoined as a nuisance. Injury in such case is "*damnum absque injuria.*"

White *v.* Kenney, 157 Mass. 12 (stable).

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[18] No attempt is made here to collect the large number of acts that under statutes are made nuisances. They include such diverse acts as advertisements on natural scenery, erections in tide waters, use of buildings for illegal sale of liquor or for gaming, etc.

Levin *v.* Goodwin, 191 Mass. 341 (bowling alley, altho pecuniary damage shown).

The decree in a nuisance case may direct the cessation of the *result*, though not necessarily of the thing causing it (e. g. the jarring of a machine, but not the use of the machine itself).

Hennessy *v.* Carmony, 50 N. J. Eq. 616.

Stevens *v.* Rockport Granite Co.,[19] 216 Mass. 486.

Cronin *v.* Bloemecke, 58 N. J. Eq. 313; Ames 560 (games of baseball not enjoined, but the playing if it so as to be a nuisance to plaintiff, *pendente lite*).

The decree may include damages.

Parker *v.* American Woolen Co., 215 Mass. 176 (pollution of stream. Damages included diminution of rent and value and cost of cleaning out).

D. Infringement of Patents, Copyrights and Trademarks. Unfair Competition.

Patents.

Suits involving the infringement of patents must be brought in the federal courts. But suits involving assignments of patents and other agreements about them may be brought in the state courts.[20]

Potterton *v.* Condit, 218 Mass. 216 (suit for royalty).

Marshall Engine Co. *v.* New Marshall Engine

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[19] In this case the decree enjoined the operating of machines in such a manner as to interfere with the reasonable comfort and enjoyment of life by the plaintiffs.

[20] Nor is the state court ousted of its jurisdiction because a question of invalidity is incidentally presented. Marshall Engine Co. *v.* New Marshall Engine Co., 199 Mass. 546.

Co., 199 Mass. 546[21] (suit for specific performance of an agreement to assign a patent).

A preliminary injunction will usually be granted against a defendant if the plaintiff's right and the defendant's infringement are clear.

Standard Elevator Co. *v.* Crane Elevator Co., 56 Fed. Rep. 718.

Public acquiescence in the plaintiff's claim, a prior adjudication of a federal court in an infringement suit, or by the Patent Office in an interference proceeding, are strong factors in determining the course of the court as to a temporary injunction.

Blount *v.* Société Anonyme, 53 Fed. Rep. 98.

Dickerson *v.* De la Vergne, etc., Co., 35 Fed. Rep. 143.

Leeds C. Co. *v.* Victor Talking Mach. Co., 213 U. S. 301.

The giving of a bond by the plaintiff to indemnify the defendant if the bill is subsequently dismissed, may be made a pre-requisite to granting a temporary injunction; or a bond by the defendant to cover damages that may be ultimately recovered may be the condition on which a temporary injunction is refused.

Consolidated Electric Storage Co. *v.* Accumulator Co., 55 Fed. Rep. 485 (bond by plaintiff).

Nat. Cash Register Co. *v.* Navy Cash Register Co., 99 Fed. Rep. 565 (bond by defendant).

If the litigation results in the plaintiff's prevailing, a permanent decree against infringement is entered, lasting for the life of the patent.

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[21] Affirmed in 223 U. S. 473.

Copyrights.

Copyrights[22] like patents are, under the constitution, within the exclusive jurisdiction of the federal government.

Constitution of the United States, Article 1, Section 8.

U. S. Comp. Stat. 1901, p. 3406.

In cases involving an alleged infringement, it must first appear that the plaintiff is an "author or proprietor" under the statute.

Callaghan *v.* Myers, 128 U. S. 617 (a reporter of decisions may be, as to head notes).

Burrow-Giles Lithographic Co. *v.* Sarony 111 U. S. 53 (photograph as a work of art).

One may make *bona fide* quotations from a book without necessarily being an infringer. The value of the material taken and the importance of it to the sale of the original work are considered.

Baker *v.* Selden, 101 U. S. 99.

Edward Thompson Co. *v.* American Law Book Co., 122 Fed. Rep. 922.

Dun *v.* Lumbermen's Credit Ass'n, 209 U. S. 20.

The granting of temporary injunctions is governed by considerations similar to those affecting their granting in patent cases.

West Publishing Co. *v.* Lawyers' Co-op. Pub. Co., 53 Fed. Rep., 265 (refused here).

The final decree, if in favor of the plaintiff, includes an accounting of the defendant's profits.

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[22] The issuance of a copyright (from the Office of the Librarian of Congress) differs from the granting of a patent in that it is made practically as a matter of course. Copyrights are issued covering books, maps, charts, paintings, drawings, music, photographs, statues, plays, etc.

Globe Newspaper Co. *v.* Walker, 210 U. S. 356 (discussion of remedies).

Unpublished Manuscripts, Photographs, Letters, etc.

The state courts have jurisdiction to restrain the unauthorized publication of unpublished manuscripts, business data, photographs, plays or works of art. Such publication is an invasion of the author's literary property at common law.

Tompkins *v.* Halleck, 133 Mass. 32 (play).

Pollard *v.* Photographic Co., L. R. 40 Ch. D. 345 (photograph).

F. W. Dodge Co. *v.* Construction Information Co., 183 Mass. 62 (commercial information).

Ferris *v.* Frohman, 223 U. S. 424 (play).

In some jurisdictions a right of privacy[23] is recognized, in accordance with which one has a right not to have his portrait published in any form without his consent, although no property right is involved.

Corliss *v.* E. W. Walker Co., 64 Fed. Rep. 280.

Pavesich *v.* N. E. Life Ins. Co., 122 Ga. 190.

The writer of the ordinary letter, or after his death his personal representative, has such a proprietary right in the publication or non-publication of it as to be able to enjoin its publication by the recipient. The latter has title to the letter itself, however, and will not be enjoined from selling it.

Baker *v.* Libbie, 210 Mass. 599 (letters of Mrs. Eddy).

Trade marks.

A trademark is a peculiar name or device by which

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[23] For an interesting discussion of this right of privacy, see an article by Messrs. Warren and Brandeis in Harvard Law Review for Sec. 1890.

a person dealing in an article designates it and of which he has exclusive use. An infringement of it is a wrongful invasion of a right at common law. The continued violation of it will be enjoined in equity.

Weener *v.* Brayton, 152 Mass. 101.

Frank *v.* Sleeper, 150 Mass. 583 ("NS" as a cigar trademark).

The wrong which equity redresses is[24] the palming off of one's goods as and for another's, the getting of another's business or the injuring of his business reputation by unfair means and perhaps the defrauding of the public.

Chadwick *v.* Covell, 151 Mass. 190.

Weener *v.* Brayton, 152 Mass. 101.

To be entitled to the protection of the court for a trademark one must show that he has adopted the mark for some article of traffic and that such article has been placed on the market.[25]

Weener *v.* Brayton, 152 Mass. 101.

The adoption and use of a trademark creates a right under the common law. Registration affords *prima facie* evidence of its adoption and use. The owner's right may be protected in the state courts[26] whether the mark is registered in the United States

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[24] This statement of the law is based on the opinion of Holmes, J. in Chadwick *v.* Covell, 151 Mass. 190. He says further, "Some judges, noticeably Lord Westbury, have preferred to rest the protection to trade marks on the notion of property rather than fraud, but he means no more than that the deception which equity will prevent need not have been intended." The Massachusetts cases have, however, for the most part proceeded on the theory that trademarks were property. See Warren *v.* Warren Thread Co., 134 Mass. 247.

[25] The temporary disuse of a mark does not lose its owner his rights. Burt *v.* Tucker, 178 Mass. 493.

[26] The federal courts do not have sole jurisdiction as in patents. The right of Congress to legislate in the matter of trademarks falls under its power to "regulate commerce."

Patent Office[27] (or, in Massachusetts, with the Secretary of the Commonwealth[28]) or is unregistered.

Traiser *v.* Doty Cigar Co., 198 Mass. 327 ("Peep In" cigars held to infringe "Pippin." Both registered with U. S.)

Apart from statute,[29] only one who in some form carries on business, may have a trademark that will be protected.

Frank *v.* Sleeper, 150 Mass. 583 (cigar jobber).

Nelson *v.* Winchell & Co., 203 Mass. 75.

Weener *v.* Brayton, 152 Mass. 101 (a labor union does not carry on business).

A word of territorial description or a common noun descriptive of the product is not a good trademark.

Standard Paint Co. *v.* Trinidad Asphalt Mfg. Co., 220 U. S. 446 ("Ruberoid" and "Rubbero" roofing).

American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85 ("Waltham Watch").

Gilman *v.* Hunnewell, 122 Mass. 139.

A word which might become a valid trademark when applied to an unpatented article may not be so when applied to a patented article. The right to the exclusive use of such a word expires with the patent, even though the word be registered as a trademark.

Dover Stamping Co. *v.* Fellows, 163 Mass. 191 ("Dover" egg-beaters).

Marshall Engine Co. *v.* New Marshall Engine Co., 203 Mass. 410.

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[27] See U. S. Stats. 1905, ch. 592.

[28] See Mass. Rev. Laws, ch. 72, sec. 7.

[29] See for example Mass. Rev. Laws, ch. 72; also Mass. St. 1904, ch. 235; St. 1907, ch. 232; St. 1909, ch. 514, secs. 31, 32.

The owner of a trademark not purely personal[30] may assign it, in connection with the sale of good will, or may grant a limited interest therein by way of license. Courts of equity will recognize such interests, even though the effect may be to deprive the assignor of the right thereafter to use his name in a business way.

Frank *v.* Sleeper, 150 Mass. 583 (NS Cigars).

Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554.

Warren *v.* Warren Thread Co., 134 Mass. 247 (passed to insolvency assignee).

Burt *v.* Tucker, 178 Mass. 493.

Hoxie *v.* Chaney, 143 Mass. 592.

But trademarks which may be transferred with the sale of a going business are not capable of being assigned, apart from the business, so as to give the assignee an exclusive right to the use of them.

Chadwick *v.* Covell, 151 Mass. 190 ("Dr. Spencer's Queen of Pain," etc.)

Covell *v.* Chadwick, 153 Mass. 263 ("Dr. Spencer's Queen of Pain," etc.)

A plaintiff will not be afforded a remedy in equity if his trademark contains misrepresentations calculated to deceive purchasers; but merely collateral misrepresentations will not be a bar to relief.

C. E. Worden & Co. *v.* California Fig Syrup Co., 187 U. S. 516 ("Syrup of Figs").

Nelson *v.* Winchell & Co., 203 Mass. 75.

Jacobs *v.* Beecham, 221 U. S. 263 (use of the word "patent" medicine when it is not patented is not such a fraud as to bar relief.

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[30] But a trade name representing the skill of the individual using it is not assignable. Messer *v.* The Fadettes, 168 Mass. 140.

Trade Names. Unfair Competition.

The protection of equity is not confined to technical trademarks. Words incapable of becoming trademarks may become so associated with a particular kind of goods or with the specific product of a certain manufacturer that they acquire a secondary meaning. Under such circumstances, the use of them by another may be restrained as unfair competition (except in certain cases where such use is permitted when accompanied by a statement showing that the article is not of the plaintiff's manufacture). The gist of such an action is not the use of particular words, but the appropriation of the plaintiff's business.

Jacobs *v.* Beecham, 221 U. S. 263 ("Beecham's Pills").

C. A. Briggs Co. *v.* National Wafer Co., 215 Mass. 100 ("Boston wafers").

American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85 ("Waltham Watch").

Grocers' Supply Co. *v.* Dupuis, 219 Mass. 576 ("Kormon[31] water," etc.)

To obtain equitable relief because of unfair competition the plaintiff is not required to prove that customers have actually been deceived, but simply that they are likely to be deceived. And it is immaterial that customers are indifferent whether they get the plaintiff's or the defendant's product.

Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437.

In the absence of a patent, or after the expiration of one, the freedom to manufacture an article similar to another's will not ordinarily be cut down under the guise of preventing unfair competition.

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[31] *Quaere*, as to the advantage, if any, derived from registering a trade name.

Flagg Manufacturing Co. *v.* Holway, 178 Mass. 83 (zithers).

Dover Stamping Co. *v.* Fellows, 163 Mass. 191.

But if the plaintiff has acquired a valuable reputation in connection with the size, shape and condition of a certain article manufactured by him, or the package in which it is contained, the defendant may not, by adopting this combination, mislead the public to the plaintiff's detriment and his own advantage. If necessary for him to adopt the combination, it should be accompanied by a designation or statement plainly showing that his article is not of the plaintiff's manufacture.

N. E. Awl and Needle Co. *v.* Marlborough Awl & Needle Co., 168 Mass. 154 (packages of awls).

Geo. G. Fox Co. *v.* Glynn, 191 Mass. 344 (loaves of bread).

Geo. G. Fox Co. *v.* Hathaway, 199 Mass. 99 (loaves of bread).

Geo. G. Fox Co. *v.* Best Baking Co., 209 Mass. 251 (loaves of bread).

Coats *v.* Merrick Thread Co., 149 U. S. 562 (thread).

Trade Secrets.

Although one who is the discoverer or inventor of formulae or secret processes of manufacture has no exclusive right as against the public, he may be protected by injunction from the disclosure of these by one wrongfully obtaining possession of them, whether such disclosure is in violation of an express contract or the breach of confidence reposed.

Peabody *v.* Norfolk, 98 Mass. 452 (machinery secrets intrusted to engineer).

Noble *v.* J. Burnett Co., 208 Mass. 75 (formulae).

And generally an employer is entitled to equitable relief where an employee has made use of information which has come to him in his employment, to the detriment of the employer.

Essex Trust Co. *v.* Enwright, 214 Mass. 507.

Am. Circular Loom Co. *v.* Wilson, 198 Mass. 182 (constructive trust in patent assignment taken by employee in breach of duty).

But the invention of a machine by an employee raises no implied agreement to assign the patent thereon to his employer; although under some conditions the employer may have a "shop right" in machines developed in his shop.

American Circular Loom Co. *v.* Wilson, 198 Mass. 182.

American Stay Co. *v.* Delaney,[32] 211 Mass. 229.

Accounting for Infringement, etc.

The relief afforded in cases of trademark and p tent infringement and of unfair competition, usually includes the right to an accounting for profits.

Nelson *v.* Winchell, 203 Mass. 75 (with rules for such accounting).

Forster Mfg. Co. *v.* Cutter-Tower Co., 215 Mass. 136.

But where the wrongful use of a trademark or name has been accidental or without intent to defraud the plaintiff or to deceive the public, there is no accounting for profits, though there may be an injunction.

Regis *v.* Jaynes, 191 Mass. 245.

In cases where profits are allowed the plaintiff, it

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[32] In this case the bill was retained to assess the damages which the employer had sustained from the breach of the defendant's contract to give all his time to the plaintiff (his employer).

is not always easy to determine the elements entering into such profits. Whether or not there should be a deduction for the overhead expenses of the defendant depends upon whether or not such expenses have been increased by the transactions complained of.

C. A. Briggs Co. *v.* National Wafer Co., 215 Mass. 100.

Nelson *v.* Winchell & Co. 203 Mass. 75.

Regis *v.* Jaynes, 191 Mass. 245.

In addition to profits, the plaintiff may have damages in appropriate cases; but such damages must arise from elements not satisfied by an accounting for the profits.

Nelson *v.* Winchell & Co. 203 Mass. 75.

Forster Mfg. Co. *v.* Cutter Tower Co., 215 Mass. 136.

E. Interference with Business (or Employment), Interference with Contract.[33]

At common law it is the right of every citizen to pursue his calling, whether of labor or business, as he in his judgment sees fit, so long as in so doing he does not violate his duties to others and to the public. Interference with his right is a tort and in proper cases, apart from statute, will be enjoined.

Article I, Massachusetts Declaration of Rights.

Carew *v.* Rutherford, 106 Mass. 1, at 14 (tort for extortion in obtaining money under threat of interfering with business).

Pickett *v.* Walsh, 192 Mass. 572, at 581.

Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110, at 117 (calling the right that of a "*reasonably free labor market*").

Vegelahn *v.* Guntner, 167 Mass. 92.

McGurk *v.* Cronenwett, 199 Mass. 457

[33] See note 33 on page 192.

(malicious interference with *known* contract; tort).

But see Mass. St. 1914, ch. 778.

See Mass. Rev. Laws, ch. 106, sec. 12[34] (a crime to make non-membership in union a prerequisite of employment).

Intentional interference with the right of an individual to dispose of his labor at his will or to have

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[33] This chapter was written prior to the passage in Massachusetts of St. 1914, ch. 778, and contains a summary of the principles carefully worked out by the Massachusetts court through a series of years. The statute will radically change the application of some of them to cases arising *in industrial disputes*. But as it will require much judicial interpretation before its application is fully known, the author has decided to allow this summary of the law, as it stood at the time the statute was passed, to remain as written. The application of *every proposition set forth in this section should be measured in Massachusetts by the limitation* prescribed in the act of1914, the first two sections of which are:

"Section 1. It shall not be unlawful for persons employed or seeking employment to enter into any arrangements, agreements or combinations with the view of lessening the hours of labor or of increasing their wages or bettering their condition; and no restraining order or injunction shall be granted by any court of the commonwealth or by any judge thereof in any case between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, or involving or growing out of a dispute concerning terms or conditions of employment, or any act or acts done in pursuance thereof, unless such order or injunction be necessary to prevent irreparable injury to property or to a property right of the party making the application, for which there is no adequate remedy at law; and such property or property right shall be particularly described in the application, which shall be sworn to by the applicant or by his agent or attorney.

"Section 2. In construing this act, the right to enter into the relation of employer and employee, to change that relation, and to assume and create a new relation for employer and employee, and to perform and carry on business in such relation with any person in any place, or to do work and labor as an employee, shall be held and construed to be a personal and not a property right. In all cases involving the violation of the contract of employment either by the employee or employer where no irreparable damage is about to be committed upon the property or property right of either, no injunction shall be granted but the parties shall be left to their remedy at law."

[34] The constitutionality of this statute may be questionable.

the benefit of a contract is malice at law (even if from good motives and without express malice), unless such interference is by one acting in the exercise of an equal or superior right which comes in contact with the other, as in fair competition.

Berry *v.* Donovan, 188 Mass. 353 (tort, brought by an operative for interference with his contract for employment).

Hoban *v.* Dempsey, 217 Mass. 166 (fair competition between unions).[35]

Burnham *v.* Dowd, 217 Mass. 351.

Malicious interference with a contract of another[36] is a form of trespass on the case and is, apart from statute, ground for injunctive relief and damages, whether the interference is by an individual or by a combination of conspiring persons.

N. E. Cement Gun Co., *v.* McGivern, 218 Mass. 198 (injunctive relief and damages to business; but no damages in this case for breach of contract because plaintiff assented to breach).

Beekman *v.* Marsters, 195 Mass. 205, at 212 (a single defendant; not an industrial case).

Reynolds *v.* Davis, 198 Mass. 294, at 298.

Berry *v.* Donovan, 188 Mass. 353, at 357 (tort).

Aberthaw Construction Co. *v.* Cameron, 194 Mass. 208 (a "conspiracy" resulting in a breach of contract).

Walker *v.* Cronin, 107 Mass. 555 (tort; single defendant).

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[35] In this case, Rugg, C. J., speaks of a boycott as having for an essential element intentional injury to somebody.

[36] But if the plaintiff has no contract, he may lack the "property interest" upon which to predicate equitable relief. Worthington *v.* Waring, 157 Mass. 421; Hoban *v.* Dempsey, 217 Mass. 166. And see Mass. St. 1914, ch. 778.

Loughery *v.* Huxford, 206 Mass. 324 (tort case).

But see Mass. St. 1914, ch. 778.

The fact that a contract is terminable at will does not affect the right to recover for unlawful interference with the contract. It does, however, affect the amount of damages.

Berry *v.* Donovan, 188 Mass. 353.

Irrespective of the presence of a contract, intentional wilful acts,[37] calculated to cause damage to the plaintiff's lawful business or calling, done with unjust purpose to cause damage, with actual resulting damage, may, apart from statute, be enjoined.

Davis *v.* N. E. Railway Pub. Co., 203 Mass. 470 (causing competitors to be omitted from directory of expressmen).

Walker *v.* Cronin, 107 Mass. 555 (maliciously[38] inducing another's workman to leave).

Plant *v.* Woods, 176 Mass. 492 (between two unions; interference with the employment of plaintiffs by intimidating the employer).

Moran *v.* Dunphy, 177 Mass. 485 (tort).

But see Holbrook *v.* Morrison, 214 Mass. 209 (suit by real estate dealer to restrain neighbor from advertising her home for sale to "colored people." No relief on facts).

Competition is no justification for interference with contract; it may justify reasonable interference with

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[37] Such an act may be the strike itself in a case where the *purpose* of the strike is unlawful, or any one of many acts done in pursuance of a strike, whether the purpose of the strike is lawful or unlawful. See Martell *v.* White, 185 Mass. 255. But see Mass. St. 1914, ch. 778.

[38] In this case the filing of a demurrer was an admission of the absence of "justifiable cause."

the business of another.[39]

Beekman *v.* Marsters, 195 Mass. 205, at 212 (competition between tourist agencies).

Walker *v.* Cronin, 107 Mass. 555.

Hoban *v.* Dempsey, 217 Mass. 166.

A combination among persons (as in a labor union) merely to regulate their own conduct, is within allowable competition[40] and is lawful, although others may be materially affected thereby.

Snow *v.* Wheeler, 113 Mass. 179 (Order of Knights of St. Crispin not a trust for an illegal purpose).

Mass. St. 1914, ch. 778.

So the combining of employed persons in a strike is lawful in *purpose* if for a direct trade advantage to the strikers.

Vegelahn *v.* Guntner, 167 Mass. 92.

Willcut & Sons Co. *v.* Driscoll, 200 Mass. 110, at 114 (higher wages and a shorter day are such trade advantages).

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[39] "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance and annoyance. If disturbance and loss come as a result of competition or the exercise of the rights of others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with; but if they come from the merely wanton or malicious acts of others without the justification of competition or the service of any interest or *lawful* purpose, it then stands upon a different footing." Walker *v.* Cronin, 107 Mass. 555.

[40] Although the struggle between employers and the employed in the attempt of each class to obtain as large a share as possible of the income from their combined efforts in the industrial field is in a strict sense hardly competition, yet, as between themselves, the principle which warrants competition permits also reasonable efforts, of a proper kind, which have a direct tendency to benefit one party in his business at the expense of the other. Knowlton, C. J., in Berry *v.* Donovan, 188 Mass. 353. This struggle between rival unions is called competition in Hoban *v.* Dempsey, 217 Mass. 166.

Minasian *v.* Osborne, 210 Mass. 250 (to prevent cross-handed lasting in shoe factory).

Lawful coercion and compulsion by strike are limited to strikes against persons with whom the organization striking has a trade dispute, and do not extend, unless under statutes, to sympathetic strikes or boycotts. The *purpose* of sympathetic strikes is unlawful.

Pickett *v.* Walsh, 192 Mass. 572 (a sympathetic strike,[41] unlawful in purpose).

N. E. Cement Gun Co. *v.* McGivern, 218 Mass. 198 (boycott; sympathetic strike).

The purpose of a strike is unlawful (apart from statute),[42]

1. Where employees seek to coerce and intimidate employers to discharge other workmen by strike or threat of strike, thereby interfering with the employment of the other workmen.

   Plant *v.* Woods, 176 Mass. 492.

   De Minico *v.* Craig, 207 Mass. 593 (foreman distasteful to strikers).

2. Where the strikers seek thereby to force on their employer a closed shop, or to compel him to submit to a delegate body of his employees and those of other concerns, all questions between him and his employees.

   Reynolds *v.* Davis, 198 Mass. 294.

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[41] In other words, a strike against A, with whom the strikers have no dispute, to compel A to force B to yield to the strikers' demands that B discharge C, is an unjustifiable interference with the right of C to enforce his calling, if he is a workman, as he thinks best (Pickett *v.* Walsh, *supra*), or with the right of C to transact his business, if he is an employer, as he thinks best. (Secondary boycott.) Aberthaw Construction Co. *v.* Cameron, 194 Mass. 208 (a strike for the purpose of inducing a breach of plaintiff's contract for the erection of Christian Science Church, for the purpose of compelling it to employ union men). N. E. Cement Gun Co. *v.* McGivern, 218 Mass. 198.

[42] See Mass. St. 1914, ch. 778.

3. Where the strikers seek to enforce the discharge of a fellow workman for an arbitrary cause such as non-membership in a union.

Pickett *v.* Walsh, 192 Mass. 572.

Whether or not a strike is lawful in purpose is a question of law.

De Minico *v.* Craig, 207 Mass. 593.

What is lawful for an individual is not necessarily lawful for a combination[43] of individuals. The result of the conspiracy may be unlawful.

Carew *v.* Rutherford, 106 Mass. 1.

Pickett *v.* Walsh, 192 Mass. 572.

Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598.

Aberthaw Cons. Co. *v.* Cameron, 194 Mass. 208 (see decree against conspiring).

Martell *v.* White, 185 Mass. 255 (in this case the primary boycott was lawful but the coercive fines for carrying it out were not).

Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418.

Burnham *v.* Dowd, 217 Mass. 351 (boycott).

But see Mass. St. 1914, ch. 778.

A combination of persons under contract, not to work for persons with whom they have a contract, is, apart from statute, an unlawful interference with business, although each may break his own contract without thereby committing a tort.

Reynolds *v.* Davis, 198 Mass. 294 (Lynn building trades case, where open shop rules were posted).

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[43] It is suggested in *Carew* v. *Rutherford*, that one person may at the theatre express disapprobation of an actor, but if several persons combine to employ others to hiss, etc., the conduct may become actionable.

So, although a member of a union seeking employment may lawfully offer such terms as to result in another being discharged and himself employed, the interference by a combination of persons to obtain the discharge of a workman under contract, because he refuses to comply with their wishes for their advantage in some matter in which he has a right to act independently (as in this case, by refusing to join a certain union), is tortious.

Berry *v.* Donovan, 188 Mass. 353 (tort) (The foregoing is the case applicable when a manufacturer signs an agreement with a union that he will employ only union help and then discharges his non-union men).

But a contract between employers and a labor union that the former will employ only members of that union where these are available, is not unlawful towards members of another union where the incitements are those of business advantage only.

Hoban *v.* Dempsey, 217 Mass. 166.[44]

What acts will be enjoined.[45]

Even though a strike be lawful in purpose, the acts done in furtherance of it may be tortious and may be enjoined.

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[44] In this case, the court says the Sherman Anti-Trust Act was not made an issue.

[45] The adequacy of the legal remedy in these cases has caused some confusion in Massachusetts. The rights of persons formerly employed were said to be personal rights, not property rights, and without precedent for their enforcement in equity, in the case of a combination among employers of labor not to employ certain operatives who had struck in one of their shops, and the putting of the names of such persons on a blacklist. Worthington *v.* Waring, 157 Mass. 421. But see a discussion of Worthington *v.* Waring in Burnham *v.* Dowd, 217 Mass. 351. See also in Fairbanks *v.* McDonald, 219 Mass. 291, the statement of the court that upon the point of refusing relief because the plaintiff's right was not a property right, Worthington *v.* Waring is now doubted as an authority. And see Mass. St. 1914, ch. 778, which purports to make the contract of employment a personal and not a property right.

In a strike for an *unlawful purpose*, all acts, peaceful or otherwise, in furtherance of the strike may, except as otherwise provided by statute, be enjoined, such as the conspiracy,[46] the payment of strike benefits, and the putting of the employer on an unfair list,[47] as well as the various acts, *infra*.[48]

In a *lawful* strike acts amounting to interference with business by coercion of employees, trespass to property, personal violence, or private nuisance, may, except as otherwise provided by statute, be enjoined.

So the levying of fines on members and the threatening to do so as a means of coercing them into remaining out, a matter which they have a right to decide for themselves, is, apart from statute, unlawful.

> Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110 (following Martell *v.* White, 185 Mass. 255, where a levied fine upon a member of a granite association for trading with a given concern was held unjustifiable).

Picketing has been enjoined when part of a general scheme or of a conspiracy to interfere with business by coercion. Picketing may, perhaps, be lawful[49] if orderly and peaceable, but if there is an attempt in combination, by means of force, threats or intimidation, to coerce employees or those who wish to become so, this becomes unlawful, both as to employers and employees.

> Vegelahn *v.* Guntner, 167 Mass. 92.

But persuasion not amounting to intimidation is lawful, and perhaps social ostracism, if without threat in business point of view.

> Willcut & Sons Co. *v.* Driscoll, 200 Mass. 110. See Mass. St. 1913, ch. 690.

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[46] Aberthaw Cons. Co. *v.* Cameron, 194 Mass. 208.

[47] See Reynolds *v.* Davis, *supra*.

[48] See also long decree in Plant *v.* Woods, 176 Mass. 492.

[49] See mention of lawful persuasion in Plant *v.* Woods. See also Mass. St. 1913, ch. 690, defining and permitting peaceful persuasion.

So parading with a placard warning workmen away, if part of a general scheme to coerce, has been enjoined as unlawful.[50]

Sherry *v.* Perkins, 147 Mass. 212.

But see effect of Mass. St. 1913, ch. 690,[51] and also of Mass. St. 1914, ch. 778.

In the coercion of workmen actual force is not a necessary element. A suggestion of force resulting in coercion of persons of ordinary courage by forcing them to a course they would not ordinarily pursue, is sufficient, and this is true whether such persons are now in the plaintiff's employ, with or without contract, or about to enter his employ.

Vegelahn *v.* Guntner,. 167 Mass. 92.

Damages for loss already sustained and for the prospect that "inability to secure work may extend over a substantial period of time" are not inconsistent with an injunction in the same decree.

Fairbanks *v.* McDonald, 219 Mass. 291.

The *public nuisance* arising from the blocking of an interstate highway, a railroad, may be made the basis

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[50] Before the ground of interference in labor cases was clearly established in Massachusetts, picketing and placarding were said to be akin to private nuisances. Sherry *v.* Perkins, *supra* (placarding) Vegelahn *v.* Guntner, *supra* (picketing). But see M. Steinert & Sons Co. *v.* Tagen, 207 Mass. 394, in which it was said that driving a banner about during a strike might be lawful, whereas the same act after the strike was over might not be.

[51] This act reads as follows:

"No person shall be punished criminally, or held liable or answerable in any action at law or in equity, for persuading or attempting to persuade by printing or otherwise any other person to do anything, or to pursue any line of conduct not unlawful or actionable or in violation of any marital or other legal duty, unless such persuasion or attempt to persuade is accompanied by injury or threat of injury to the person, property, business or occupation of the person persuaded or attempted to be persuaded, or by disorder or other unlawful conduct on the part of the person persuading or attempting to persuade, or is a part of an unlawful or actionable conspiracy."

of interference in a suit by the Federal Attorney General.

In re Debs, 158 U. S. 564.

Parties to suit.

If a union is unincorporated, it should not be made plaintiff or defendant.[52] The words "to your complainant unknown" should not be used, but persons should be named as proper representatives of a class,[53] with the allegation that the members are too numerous to be joined as parties.

Reynolds *v.* Davis, 198 Mass. 294.
Pickett *v.* Walsh, 192 Mass. 572.
Hoban *v.* Dempsey, 217 Mass. 166.

A corporation may be enjoined.

Aberthaw Construction Co. *v.* Cameron, 194 Mass. 208 (where a board of directors of a church was enjoined as a "co-conspirator").

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[52] A union was made defendant in Vegelahn *v.* Guntner, *supra*, but this fact escaped attention (see Pickett *v.* Walsh at 590).

[53] Multifariousness and misjoinder of plaintiffs should be avoided. In Reynolds *v.* Davis, various firms doing different kinds of business were joined as plaintiffs, apparently improperly, but the court calls attention to the fact that no objection was raised. See also Pickett *v.* Walsh, *supra*.

CHAPTER X.

PECUNIARY RELIEF IN EQUITY.

A. ACCOUNTING.
B. EXONERATION.
C. CONTRIBUTION.
D. SUBROGATION.
E. MARSHALING.

A. ACCOUNTING.

Equity has jurisdiction in accounting

1. *Where there is a fiduciary relation,*[1]

Hewitt *v.* Hayes, 205 Mass. 356 (rules for following trust funds; or cestui may prove in bankruptcy).

Newell *v.* Hadley, 206 Mass. 335 (leading case on mingled trust funds).

Hutchins *v.* Page, 204 Mass. 284 (partnership).

Moore *v.* Rawson, 199 Mass. 493 (partnership, including good will).

Campbell *v.* Cook, 193 Mass. 251 (agency to manage property under power of attorney).

Rolikatis *v.* Lovett, 213 Mass. 545 (attorney and client).

Falardeau *v.* Washburn, 199 Mass. 363 (attorney and client).

[1] In Massachusetts, an action for money had and received will also lie in a simple case of money held by the defendant to which the plaintiff has an equitable right. Cole *v.* Bates, 186 Mass. 584.

Whitman *v.* McIntyre, 199 Mass. 436 (by assignor against assignee for benefit of creditors).

O'Brien *v.* McNeil, 199 Mass. 164 (mortgagor against mortgagee in possession; rules governing; interest, etc.).

Atty. Gen'l *v.* Bedard, 218 Mass. 378 (information against managers of charitable fund for support of strikers' families).

Von Arnim *v.* American Tube Works, 188 Mass. 515 (minority stockholder may require accounting of officers who are misusing corporation[2] funds).

Quinn *v.* Hayden, 219 Mass. 343 (a joint enterprise).

Edwards *v.* Willey, 219 Mass. 443 (one furnished capital; other labor, in joint enterprise; no interest allowed former).

The ordinary relation of creditor and debtor does not call for equitable accounting, even though transactions are numerous and plaintiff does not know them all, unless there is great complication.[3]

Brown *v.* Corey, 191 Mass. 189 (broker and customer).

Peters *v.* Equitable Life Ass. Co., 196 Mass. 143.

2. *Where there is great complication*,[4]

Mass. R. L., ch. 159, sec. 3, cl. 6 (accounts

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[2] The rule in such cases is that application should first be made to the corporation to bring the bill; but in some instances this is unnecessary. In such case the corporation should be made a party defendant and relief should be for the benefit of the corporation. See discussion in Chapter VIII, Part B, *supra*, also Pomeroy, sec. 1095.

[3] The bill should always allege the accounts to be complicated, where there is no fiduciary relation.

[4] See note 4 on page 204.

that "cannot be conveniently and properly adjusted and settled in an action at law").

Pierce *v.* Equitable Life Ass. Soc., 145 Mass. 56 (tontine insurance policy).

Hallett *v.* Cumston, 110 Mass. 29.

Thurston *v.* Hamblin, 199 Mass. 151 (to ascertain net profits; inventor against manufacturer).

This jurisdiction is due not to absence of common law remedy but to its inadequacy[5] and inconvenience.

3. *Where the accounting is incidental to some other right of relief.*

Sunter *v.* Sunter, 198 Mass. 137 (principles applied in constructive trusts).

Clark *v.* Storey, 208 Mass. 36 (bill to redeem from fraudulent foreclosure; defendants charged with profits, and allowed compensation).

Noble *v.* Jos. Burnett Co., 208 Mass. 75 (incidental to injunction against use of formulae).

Reading Stove Works *v.* S. M. Howes Co., 201 Mass. 437 (for profits of trade name infringement).

Nelson *v.* Winchell & Co., 203 Mass. 75 (trademark; rules for determining difference between damages and profits).

McKay *v.* Coolidge, 218 Mass. 65 (judgment

In such cases, the inconvenience of the defendant's answering in this state will be considered if the plaintiff is a non-resident, but not where he is a resident. Peters *v.* Eq. Life Ass. Co., 196 Mass. 143.

[5] Much of equity's control of estates and the winding up of corporations was a development from its superior procedure in accounting.

creditor in tort suit, to collect from deceased defendant's legatees).

When an account is of such a nature that an action may be brought at law or in equity, the court which first acquires jurisdiction will decide the case.

Nash *v.* McCathern, 183 Mass. 345.

In accounting the following rules are observed as to the application of payments, where there are several debts between the parties.

1. Money paid to a creditor must be appropriated to the discharge of such debt, if any, as the debtor specifies at the time of payment. In some cases his direction has been inferred from circumstances.

Reed *v.* Boardman, 20 Pick. 441.
Gay *v.* Gay, 5 Allen 157.

2. If the debtor does not specify, expressly or by implication, the creditor may apply the payment to any account, except an illegal one, before action is brought.

Rohan *v.* Hanson, 11 Cush. 44 (illegal one).

He may even apply it to a debt barred by a statute of limitations,[6] or not enforceable because of the Statute of Frauds.

Haynes *v.* Nice, 100 Mass. 327 (Statute of Frauds).

3. If neither party appropriates the payment to a specific debt, equity will appropriate the credits toward the discharge of debits in the order of their time, excluding, however, those barred by a statute of limitations. This is called the Rule in Clayton's Case.

Crompton *v.* Pratt, 105 Mass. 255.

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[6] But he may not by such part payment remove the bar of a statute of limitations as to the balance.

Newell *v.* Hadley, 206 Mass. 335 (rule stated as between cestuis and distinguished from facts here).

Hewitt *v.* Hayes, 205 Mass. 356 (modification of rule).

B. Exoneration.

Whenever one pays a debt[7] for which another is primarily liable, he is entitled to indemnity from that person. There is usually relief at law under an express or implied contract.

Tillotson *v.* Rose, 11 Met. 299 (surety, who paid a note).

Rice *v.* Southgate, 16 Gray 142.

If he has paid, he may recover only what he has properly paid, with interest and costs. He may compromise the debt before it is due, and then sue on maturity.

Hayden *v.* Cabot, 17 Mass. 169.

Tillotson *v.* Rose, 11 Met. 299.

In certain cases he may, after he is liable and before he has been sued, compel in equity the principal to settle the debt. This is called exoneration.

Minot, Pet'r, 164 Mass. 38.

Wooldridge *v.* Norris, L. R. 6 Eq. 410.

Rice *v.* Southgate, 16 Gray 142.

Ascherson *v.* Tredegar Dry, etc. Co., (1909) L. R. 2 Ch. 404.

Furber *v.* Dane, 203 Mass. 108.

Pomeroy, sec. 1417.

Brandt Sur. and Guar., sec. 243; sec. 261.

But he may only do this where he admits his own secondary liability if the principal does not pay.

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[7] This principle does not apply to *ex delicto* claims.

Cotting *v.* Otis Elevator Co., 214 Mass. 294.

C. CONTRIBUTION.

Where one of several persons who have joint, or joint and several, contract obligations, or who are co-sureties, has paid more than his proportionate share of the obligation, he is entitled to recover such excess from the others liable with him.[8]

Wolmershausen *v.* Gullick, L. R. (1893) 2 Ch. 514 (history and review of English cases).

Weeks *v.* Parsons, 176 Mass. 570 (between accommodation indorsers).

Ray *v.* Powers, 134 Mass. 22 (members of a club).

Barnes *v.* Boardman, 152 Mass. 391 (between life tenant and reversioner).

Newcomb *v.* Gibson, 127 Mass. 396 (sureties).

Tomlinson *v.* Bury, 145 Mass. 346 (specific legatee against general legatees).

Putnam *v.* Misochi, 189 Mass. 421 (stockholders).

Labbe *v.* Bernard, 196 Mass. 551 (surety who is also assignee of the contract assured must share with co-surety all advantage from contract).

Where in a will property specifically[9] bequeathed is appropriated to pay debts or to satisfy the claims

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[8] While such relief may be had in assumpsit on the theory of implied contract, it is not always adequate, as, for example, where several co-sureties must be sued separately or where one is insolvent, at law each is liable for an aliquot part (Griffen *v.* Kelleher, 132 Mass. 82); in equity, ratably, to the exclusion of insolvent and non-resident sureties. Hendrick *v.* Whittemore, 105 Mass. 23. Whitman *v.* Porter, 107 Mass. 522. Cary *v.* Holmes, 16 Gray 127.

[9] A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator, so that it can be identified.

of testator's widow who has waived provisions a legatee[10] is entitled to contribution from other legatees under the will.

Tomlinson *v.* Bury, 145 Mass. 346 (bill for contribution).

See Mass. Rev. Laws, ch. 135, sec. 25 *et seq.*

Where specific legacies must themselves contribute, they do so proportionally, except where the legacy is in lieu of a claim or debt, or the terms of the will or the position of a legatee otherwise require.

Farnum *v.* Bascom, 122 Mass. 282.

A surety who has paid a debt is entitled to share in all security taken for indemnity by a co-surety, and if a surety is released without the consent of a co-surety, the co-surety is relieved to the extent of the security surrendered.

Guild *v.* Butler, 127 Mass. 386.

Newcomb *v.* Gibson, 127 Mass. 396.

But a mere renewal of a note by the maker does not give a co-surety any rights to be relieved.

North Ave. Sav. Bank *v.* Hayes, 188 Mass. 135.

In order to have contribution between sureties, the parties must be co-sureties.

Longley *v.* Griggs, 10 Pick. 121.

Among the many defenses to an action for contribution are that the plaintiff surety has collateral or has paid with funds of principal debtor; that time has been given the principal debtor or a co-surety without the defendant surety's consent; that the principal debtor or a co-surety has been released by the creditor or by the plaintiff surety; that the

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[10] This and the succeeding paragraph apply as well to devisees as to legatees.

plaintiff surety has released or lost collateral; that the defendant surety is bankrupt or has a set-off against the plaintiff or is within the statute of limitations; or that the plaintiff surety has by his fraud contributed to the default of the principal.

Spencer on Suretyship, sec. 158.

In an action for contribution in some jurisdictions, it is a defense that the plaintiff surety paid after the claim of the creditor against him was barred by a statute of limitations, but no defense that the statute has run as against the creditor, in favor of the defendant surety, if it has not in favor of the plaintiff surety.

Spencer on Suretyship, sec. 165.

D. Subrogation.

Whenever one not a volunteer, for the protection of his own rights, pays a debt for which another is primarily liable, he is in equity subrogated to the creditor's rights, i. e. he is entitled to enforce the right the creditor had against the debtor, including the application of all the securities the creditor has from the debtor. [11]

Stetson *v.* Moulton, 140 Mass. 597.

Blake *v.* Traders' Bank, 145 Mass. 13.

North Nat'l Bank *v.* Hamlin, 125 Mass. 506 (negotiable paper, paid by indorser, kept alive).

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[11] The right of subrogation is of equitable origin. Skinner *v.* Tirrell, 159 Mass. 474. In most cases, of course, a surety who has paid the debt may have indemnity in a suit at law, but there are cases where his only adequate remedy is by proceeding to enforce the rights of the creditor against the principal debtor (which, though gone at law, are kept alive for certain purposes in equity). For example, where the surety's right against the debtor is barred by a statute of limitations, but the creditor's right, being on a sealed instrument, is not; or where the surety's right against the debtor is barred by a discharge in bankruptcy, but the creditor's right, being on a fiduciary debt, is not. Crower *v.* Crower, 29 Grattan 280.

Labbe *v.* Bernard, 196 Mass. 551 (surety, as assignee of principal, finished a contract).

Lamb *v.* Montague, 112 Mass. 352 (second mortgagee who pays first mortgage).

Athol Sav. Bank *v.* Bennett, 203 Mass. 480 (judgment creditor who paid pledgee's note secured by stock).

Chicago St. Co. *v.* Car Co., 139 U. S. 79 (insurance company paying loss).

Newell *v.* Hadley, 206 Mass. 335 (leading case on doctrine of unjust enrichment as between two trust funds held by one trustee).

Fitcher *v.* Griffiths, 216 Mass. 174 (wife paying mortgage given by husband, subrogated).

It is immaterial that the security has been given at a time subsequent to the making of the contract or without the knowledge of the surety.

Johnson *v.* Bartlett, 17 Pick. 477.

Hart *v.* Western R. R. Co., 13 Met. 99 (subrogation of an insurance company to tort rights).

A mere volunteer has no rights of subrogation.

Pearmain *v.* Mass. Hosp. Life Ins. Co., 206 Mass. 377 (second mortgagee paying taxes).

Aetna Life Ins. Co. *v.* Middleport, 124 U. S. 534.

Skinner *v.* Tirrell, 159 Mass. 474 (one furnishing a married woman money to buy necessaries is not subrogated to the rights of one who furnished necessaries).

Title Guarantee & Trust Co. *v.* Haven, 196 N. Y. 487.

When a purchaser of land agrees with a mortgagor to assume and pay a mortgage debt but fails to do so, the mortgagor, if compelled to pay, will be subrogated to the rights of the mortgagee against the premises, or may look to the personal responsibility of the purchaser.

Dean *v.* Toppin, 130 Mass. 517.
Locke *v.* Homer, 131 Mass. 93.
Reed *v.* Paul, 131 Mass. 129.

One who has a lien on land, may, under some conditions, be subrogated in equity to the owner's chose in action against another for damages.

Bates *v.* Boston Elevated Railway, 187 Mass. 328.

One who sells land subject to a tax and later is sued for and pays the tax, is subrogated to the tax collector's lien on the property.

Webber Lumber Co. *v.* Shaw, 189 Mass. 366.

So although the purchase of merchandise in bulk without certain formalities is by statute[12] fraudulent, the purchaser, if innocent of actual fraud, will be subrogated to the claims of secured creditors he has paid.

Adams *v.* Young, 200 Mass. 588.

A surety who has paid a debt may ordinarily recover by subrogation or by way of indemnity only his actual loss,[13] but has a right of action whenever he pays any part of the obligation.

The surety's remedy is conditional on his satisfying the obligation or some part of it, and arises

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[12] Mass. St. 1903, ch. 415.

[13] Compare Fowler *v.* Strickland, 107 Mass. 552, in which an accommodation indorser on a $2000 note for the maker's benefit, bought the note for $1000 from the holder, who had paid $2000 for it. He was entitled to recover from the maker $2000.

only then, except that he may compromise a claim before it is due, and wait until it matures to assert his right.

Thayer *v.* Daniels, 110 Mass. 345.

Chandler *v.* Brainard, 14 Pick. 285.

Doolittle *v.* Dwight, 2 Met. 561.

To avoid circuity of action equity will, however, protect those who by an enforced payment will become entitled by subrogation to indemnity from the one who is to receive the payment.

Harmon *v.* Weston, 215 Mass. 242.

A surety, by failure to raise against the creditor his personal defenses (such as a statute of limitations or the Statute of Frauds), does not lose his right to subrogation or indemnity.

Beal *v.* Brown, 13 Allen 114 (Statute of Frauds).

Shaw *v.* Loud, 12 Mass. 447 (a statute of limitations).

A surety, by failure to raise against the creditor such defenses as would have excused the principal debtor, does not lose his right to indemnity if he acts in good faith and without knowledge of the defense.

Warner *v.* Morrison, 3 Allen 566.

Frith *v.* Sprague, 14 Mass. 455.

E. Marshaling.

One who has a right to payment from a single fund may compel another who has a right to payment from more than that one fund to exhaust those funds upon which the first has no claim. This is marshaling.

Carter *v.* Tanner's Leather Co., 196 Mass. 163.

Adams *v.* Young, 200 Mass. 588.

Baker *v.* Davie, 211 Mass. 429.

Bates *v.* Boston El. Railway, 187 Mass. 328.

Pomeroy sec. 1414.

The doctrine will not be enforced to the prejudice of a creditor against whom it is sought to be applied.

Carter *v.* Tanner's Leather Co., 196 Mass. 163.

INDEX

A

ACCIDENT

(see MISTAKE)

relief from, in equity and at law 86-88
jurisdiction in 86
relief from lost instruments 86
defective execution of powers 87
preventing defense on merits 87
forfeitures 87
arising in settlement of estates 88
alteration or mutilation of instruments 88
no relief from express agreement 88
no relief against bona fide purchaser 88
distinguished from mistake 89

ACCOUNTING.

between partners 19, 133
equitable jurisdiction in 202-206
where there is fiduciary relation 202, 203
between trust funds 202
where there is complication 203
incidental to other relief 204
at law or in equity 205
rules observed in 205

ACTIONS .

(see EQUITY JURISDICTION; CONTRACT; COURT OF COMMON LAW)

early, at common law 3
early, in chancery 3, 4
later, in chancery 4
against parties within the jurisdiction 34
affecting property outside the jurisdiction 34, 35
equitable restraint of actions at law 35, 160-162
relating to local property of non-residents 36, 37

ADEQUATE REMEDY AT LAW

(see INADEQUACY OF LEGAL REMEDY)

definition of 24
absence of, basis of equity relief 25
presence of, a defense to equitable procedure 26
where subject matter is ordinary personal property . 27
failure to raise defense of 30
to enforce assignments, ... 54
for fraud in some cases 98
where contract to convey has been executed by vendor 118
if price has been put on unique subject matter . . . 120
discussion of, in labor disputes 193

ADMINISTRATORS AND EXECUTORS
(see DEATH; WILLS).
not considered assignees 56
duty to perform decedent's agreements for sale of land 81, 82
accidents by, relieved from in equity 88
are volunteers 96
certain purchases and sales by, fraudulent 101
may bring bill to set aside fraudulent conveyance . . 105

AGENT.
of non-resident may enjoin enforcement of contract here 97
fraudulent representation of, as ground for relief . . . 100
certain purchases and sales of, fraudulent 101, 102
vendor of good will may not compete as 132

AGREEMENT.
(see SEALED INSTRUMENTS; WRITTEN INSTRUMENTS; CONTRACT).

ALTERATION.
of instruments, relief from, ... 88

AMENDMENTS .
to and from equity 9, 116

ARBITRATION.
certain agreements for, not enforcible 121, 122
certain agreements for, enforcible 122
as condition precedent to suit 122
damages for revocation of agreement to submit to . . 122
award after, specifically enforced 123

ASSETS.
of partnership may be distributed 18
distribution of, in equity, follows law 41

ASSIGNEE.
(see ASSIGNMENTS).
his right to sue at law in assignor's name 52
his right, under statutes, to sue 54
may sue in equity on equitable assignment 57
rights of, to enforce restriction 137, 138

ASSIGNMENTS.
certain, not recognized at early common law 52
how made 53
delivery as an element in 53
as affected by modern statutes 54
what choses in action are assignable 54-56
equitable 52, 57
of fractional parts of funds 57
certain voluntary agreements not assignable 58

stranger recognized as assignee, in equity 58
orders as 59
when assignee's title vests 60
nature of assignee's title 60
liability of lessee's assignee 60
rights under successive 60
under fictitious name, valid 61
none, of right to sue for fraud 112
of rights in equity to set aside instruments for fraud . 112
of trade marks and names 187

ATTORNEY.
client not *in pari delicto* in champertous contract 102
purchases and sales by, as constructive fraud against client 101, 102
service on, where defendant a non-resident 162
accounting with 202

ATTORNEY GENERAL
may seek injunction against monopolies 128
should bring bill to enjoin public nuisance 176

AUTHOR.
may have relief for infringement of copyright 183

AWARDS.
specific enforcement of, after arbitration 123

B

BANK BOOKS.
as subjects of assignment 53

BANKRUPTCY.
trustee in, may set aside fraudulent conveyance 105, 106
not ground for relief, where conveyance is of trust property 105
statutes defining fraudulent preference 108
of debtor as ground for specific performance 120
effect of sale of good will, following 132, 133
as a ground for enjoining proceedings in state courts .. 161
as a defense to contribution 209
as a ground for subrogation 209

BILL TO REACH AND APPLY.
an equitable interest 105

BONA FIDE PURCHASER.
without notice 61
protected, where relief sought against accident 88
protected where relief sought against mistake 96

BOND.
(See SECURITIES).
jurisdiction, to chancer 5
jurisdiction to relieve against penalties 7
benefit of, assignable 55
of indemnity in suits on lost instruments 86, 87
holder of, may bring certain suits 164
in patent litigation 182

BOUNDARIES.
projection of structure over, enjoined 170

BOYCOTTS AND STRIKES.
relief by injunction in 191-201

BUSINESS.
(see PARTNERSHIP; PARTNERS).
specific performance of agreement to sell..... 120
contracts not to compete in ..... 129 *et seq.*
contracts involving sale of good will of ..... 129 *et seq.*
whether sale of, implies agreement not to compete .. 133
restrictions following involuntary sale of 132, 133
right to advertise as successors of 133
restrictions enforced, after sale of 136, 137
landlord's right to enjoin particular kinds 180
license to conduct, as a defense to nuisance action 180
injury to, as an element in trademark suits 185
injury to, as an element in unfair competition 188
injunctions to restrain interference with 191-201

C

CANCELLATION.
(See RESCISSION; REFORMATION).
of deed of foreign property..... 35
of contract, as form of relief in mistake 93
of fraudulent conveyances 105
of executory contract, for fraud 110

CERTIORARI.
adequate equitable remedy a defense to 26
as an adequate remedy for certain acts of officials..... 163

CHATTEL MORGAGES.
of personalty to be acquired, operate how 57

CHATTELS.
(see PERSONAL PROPERTY).

CHOSES IN ACTION.
assignment of 52-60
what, are assignable 54, 55
estoppel from entrusting another with evidence of 74
fraudulent transfer of 104

CLAYTON'S CASE, RULE IN
defined 205

CLERGYMAN.
certain contracts with parishioner, voidable 102

COMPETITION.
(see MONOPOLY).
enforcement of contracts not to compete..... 129 *et seq.*
limited by sale of good will, when..... 130 *et seq.*
no justification for interference with contract..... 194, 195

COMPLETE RELIEF.
in equity, after jurisdiction had 30

COMPROMISE.
no relief from mistake at basis of 92
agreement as to will, enforced 119
one liable for another's debt may 206, 212

CONCURRENT JURISDICTION.
in some cases 28
necessity for election, no bar to..... 75

CONSIDERATION.
in assignments 52
in certain estoppels 73
inadequacy of, as ground for relief 100
usually absent, in fraudulent conveyances 106
given for deed fraudulently obtained, must be restored on rescission 113
inadequacy of, as bar to specific performance 154

CONSPIRACY.
as an element in labor disputes 193-201

CONSTRUCTIVE FRAUD.
(see FRAUD).
equitable relief from results of ..... 100 *et seq.*
different classes of ..... 100 *et seq.*
statute of frauds does not apply to 113
one guilty of, may yet have subrogation 113

CONTEMPT.
penalty for disobedience of decree 34, 116

CONTRACT.
(see AGREEMENT; COVENANT; CHOSES IN ACTION).
when one rescinds, he must place other in *statu quo* .. 46
certain, not assignable 56
present interest in, may be assigned 56
estoppel by 70

conversion from land contracts 78-84
validity of, as requisite of conversion 81
between certain fiduciaries, voidable 102
action of, for fraudulent violation of agreement . . . 109
action of, with attachment, to remedy fraud 109
action of, to recover money obtained by fraud 109
cancellation or rescission, for fraud 110
specific performance of, ... 116 *et seq.*
enforcements of affirmative 117
about certain chattels enforced 118
to sell business 120
to sell unique articles needed in business 120
negative in form, when enforced . . . . . 126 *et seq.*
affirmative, requiring the performance of labor . . . 123-126
negative, involving personal services 126-128
limiting use of property 128, 129
not to compete, express and implied . . . . . 129 *et seq.*
enforcement of those partly performed 143-147
partial performance of 147
time the essence of the contract 148-151
marketable title necessary to enforcement of 151
mutuality an essential feature 152
necessity and adequacy of consideration in 154
sundry defences to specific performance of 155
one breaking, cannot recover payment made 157
when option to.render void, is on vendor 157
injunctions to restrain interference with 191-201
indemnity in action of, after payment of another's debt 206
as basis of contribution 207
inadequacy of relief in action of, between co-sureties . 207

CONTRIBUTION.

when one may have 207-209
at law and in equity 207
defenses to 208, 209

CONVERSION.

(see EQUITABLE CONVERSION).

CONVEYANCE.

(see FRAUDULENT CONVEYANCE; RECORDING ACTS; TITLE; DEEDS).

CO-OWNERS.

(see CO-TENANTS; JOINT OWNERS).
suits between, of personalty 20

COPYRIGHTS.

nature of 183
bills to restrain infringement of 183

CORPORATION.
adequacy of legal relief in contracts relative to shares in 27
estopped to deny validity of incorporation 70
fraudulent contracts affecting officers of 101
promoter's frauds affecting 103
quo warranto and mandamus against officials of . 162, 163
restraint of acts of officials of 162, 164
may be enjoined as a conspirator in labor case . . . 201
when stockholders may require accounting of officers of 203

CO-TENANTS.
suits between 19
waste between 166
one of, may restrain stranger's trespass 172

COURTS OF COMMON LAW.
early 1
in England 2, 3
equitable defenses in 8
amendment of suits to and from 9
no jurisdiction over suits between husband and wife . 12
suits in, between partners 16, 17
adequacy of remedies in 24
formerly did not recognize assignments 52
remedies in, for fraud 109
equity jurisdiction to restrain suits in 160-162
jurisdiction of, in waste 165
jurisdiction over simple money trusts 202
concurrent jurisdiction in accounting 205
indemnity in 206, 209, 211
contribution between sureties in 207

COURTS OF EQUITY.
(see EQUITY JURISDICTION).

COVENANT.
(see CONTRACT; AGREEMENT).
not to compete, when enforcible 129-133
running with the land, at law 135
in deed and lease 135
enforcible between those having priority 135
obligation of grantee in deed poll, not a 135
may be a personal contract 135
effect of privity of estate on 135
restricting use of realty or personality 137

CREDITOR.
avoidance of fraudulent conveyance by . . . . . 103 *et seq.*
conveyance to, not a preference at common law . . . 108

conveyance fraudulent against, good between parties . 108
may not always have equitable accounting 203
rules for accounting with debtor 205
application of payments by 205

CREDITORS' BILLS.
because of inadequacy of legal remedy 26

CURTESY.
how affected by conversion 82

D

DAMAGES.
in money in equity 24
rule for, in rescission 111
as a form of equitable relief for fraud 111
may be assessed in equity, after refusal of specific performance 116
inadequacy of legal, as ground for specific performance 117
recoverable for revocation of agreement to arbitrate . 122
for breach of restrictive covenants 137, 141
where land freed of restrictions by Land Court 142
in equity for waste 168
trespass restrained, though damage nominal . . . . 169 ,170
alternative decree for, in trespass 170
in place of injunction to restrain disturbance of easements 173
nuisance restrained, though damage nominal 178
may accompany injunction against nuisance . . . 179, 181
profits allowed in decrees for copyright violation . . . 183
for violation of trade secrets 190
profits and damages in various infringement suits . 190, 204
as affected by length of contract, in malicious interference cases 194
an element in interference with business or employment 194, 200
distinguished from profits 204
rules for, in certain accounting cases 204

DEATH.
of agreed vendor, results of 81, 82
of agreed vendee, results of 81, 82, 83
of party against whom equitable right to relief for mistake exists 96
of one who has made a fraudulent conveyance 105
does not bar following trust property, procured by fraud 112
a bar to action of tort for fraud 113
of partner, affect in limiting competition 132, 133

DEBTS.
of partnership, contribution as to 19
merger of contract debt, in judgment 67

presence of, as basis for creditor's relief from conveyance 105
rules where there are several, between same parties . . 205
indemnity after payment of another's 206
compelling exoneration 206

DECEIT.
(see MISREPRESENTATION; FRAUD; ESTOPPEL).
as ground for estoppel 71, 72, 73
as fraud in equity . . . . . 99 *et seq.*
tort remedy for 109
how far an element in trade name relief 188

DECREES.
(See EQUITY JURISDICTION).
in interpleader 22
are *in personam* 34
disobedience of, how punished 34
may affect property outside the jurisdiction 34, 35
affecting local property of non-residents 36
against minors and insane persons 37
restraining suits at law 37
different forms of, in equity 110-112
rescinding deed obtained by fraud, should restore defendant's consideration 113
rendered effective by enjoining law suits 160-162
erroneous, effective because plaintiff did not appeal . . 170
in nuisance cases 181
in patent infringement suits 182
in copyright cases 183

DEEDS.
(see WRITTEN INSTRUMENTS; LOST INSTRUMENTS).
laches no defense to void 51
as a means of assigning a chose in action 53
right of entry for breach of condition in, not assignable 56
statutes for recording 61-64
notice as affecting 61-64
estoppel to deny effect of 67, 68
title by estoppel from warranty (or quitclaim), ... 68
mistake in, when and how remedied . . . . . 90, 94 *et seq.*
rescission of deed fraudulently obtained, restores defendant's rights 113
specific re-delivery of 119
whether covenants in, run with the land 135
acceptance of, may create restrictions 136, 137, 138

DEFENSES.
(see STATUTE OF FRAUDS; STATUE OF LIMITATIONS).
equitable, in law cases 8
in interpleader 21, 22

that legal relief is adequate 26, 28
failure to raise defense of adequate legal remedy . . . 29, 30
plaintiff's fraud as a defense 48
estoppel 64-76
to bills to relieve from accident 88
to bills to relieve from mistake 96
to bills for fraudulent conveyance 106, 108
that conveyance was in execution of oral trust 107
release obtained by fiduciary, may not be 109
as a form of equitable relief 110
to specific performance, as remedy for fraud 112
laches as a defense to fraud 112
that plaintiff was party to fraud 112
death of plaintiffs as defense to action for fraud . . . 113
antecedent fraud may not be defense, because merged in contract 113
to suit for purchase price of land 118
anti-trust act must be pleaded 128
to enforcement of restrictions 141-143
Statute of Frauds, in specific performance 143
that time is of the essence of contract 148-151
that title not marketable 151, 152
lack of mutuality 152-154
inadequacy of consideration 154
sundry defenses to specific performance 155
lack of identification of property in bill to perform . . 157
equitable, as basis of injunction against suit 160
omission to present, not ground for relief in equity . . 160
to action for waste 167, 168
to actions for trespass 171-173, 177
prescription as a defense to bill for nuisance or trespass 177
to bills for nuisance 177-181
to bills for infringement of trademarks 187, 190
to bills for infringement of patents, marks, etc. . . . 190
to bills for contribution 208, 209
to bills for subrogation 212
to bills for marshaling 212

DEMURRER IN EQUITY.
where legal remedy adequate 28
where laches appears in bill 50
where property not identified in bill to perform . . . 157

DIRECTORS.
(See CORPORATIONS).
secret profits by, as constructive fraud 103

DISCHARGE.
of mortgage, corrected to assignment 98

DISCRETION.
as to amending to and from equity 9, 116

as to jury issues 33
revision of, as to jury issues 33
refusal to foreclose foreign mortgage as a matter of . 35
as to specific performance 116
to assess damages after refusal of specific performance . 116

DONATIONS MORTIS CAUSA.
(see GIFTS).
good between husband and wife 15

DOWER.
estoppel from release of 69
how affected by conversion 82
of widow of agreed vendee 82, 83

DRAMATIC COMPOSITION.
(see PLAYS).

DRUNKENNESS.
of partner, as ground of dissolution 18
of contracting party, as fraud 101

DURESS.
(see UNDUE INFLUENCE).
of contracting party, as ground of fraud 101

E

EASEMENTS.
legal, nature of 133-134
equitable (see RESTRICTIONS).
doctrine of part performance applied to 147
restraint of disturbance of 172, 173

ELECTION.
of remedies, a form of estoppel 74
where there is none 75
where two suits for same cause 75
does not prevent concurrent remedies 75
under Workingmen's Compensation acts 75
to proceed for damages, after specific performance refused 116
between suit at law or specific performance 155

EMINENT DOMAIN.
conversion of proceeds, where land taken by 78

EMPLOYER AND EMPLOYEE.
(see LABOR; BUSINESS).
duty of employee not to reveal trade secrets . 127, 189, 190
employer's right in inventions 190
injunctions in disputes between 191-201

ENGLAND.
early courts in 1, 2, 3
present law courts 2
early law actions in 3
adequacy of legal remedy in 26
chancery jurisdiction in, as affecting right to jury trial 32

EQUITABLE CONVERSION.
based on maxim 45
definition of 76
enforced where 76
occur when 77, 78
duration of 78
of proceeds of insurance 79
re-conversion 79
Statue of Frauds in 80
in determining inheritance taxes 80
in land contracts 80
effect of death of agreed vendor or vendee 81, 82
effect on dower or curtesy 82, 83
effect of loss before conveyance 83, 84

EQUITABLE EASEMENTS.
(see RESTRICTIONS).

EQUITABLE LIENS
the maxim that supports them 45

EQUITABLE MORTGAGE.
where debtor has agreed to give mortgage 121

EQUITABLE REPLEVIN.
jurisdiction of equity in 119

EQUITY JURISDICTION.
history of the rise of 2-4
history of in Massachusetts 5
extent of present system 6
effect of, on legal rules 7
effect of, on statutes 7
an outline of 9
because of subject matter 9
because of remedy sought 10
because of parties seeking remedy . . . . . 12 *et seq.*
actions exclusively within . . . . . 12 *et seq.*
effect of adequacy of legal remedy on . . . . . 24 *et seq.*
concurrent with law 24, 25, 28
because of legal inadequacy 24
not given in some cases by waiver of defense 28, 29
once obtained, retained for all purposes 30
dismissal for want of 30, 31

formerly dependent on amount involved 31
retention of, though changes *pendente lite* 31
is *in personam* 34
over persons 34
over property outside the jurisdiction 34, 35
to enjoin suit in another state 35
to enjoin against tort in another state 35
to foreclose foreign mortgage 35, 36
over local property of non-residents 36, 37
affords relief where new right created 40
follows the law 40
one who seeks, must do equity 45
plaintiff in, must have clean hands 46
will not determine respective rights of wrong-doers . . 49
over assignments 52, 57, 58
in cases of equitable conversion 76
to relieve from accident 86-88
to relieve from mistake 88-98
to relieve from fraud 98-114
to recover and apply equitable interest 105
to enforce contracts specifically 115-157
over replevin 119
to enjoin, generally 158-201
to restrain law suits and judgments 160-162
to restrain acts of officials 162-164
in specific reparation and prevention of torts . . . 165-201
in accounting 202-206
in exoneration 206
in contribution 207-209
in subrogation 209-212
in marshaling 212-213

ESTOPPEL

(see RES JUDICATA).
adverse equity sometimes raised by 46
under recording acts 62, 73
definition of 64
legal 65
by record 65, 66, 67
against suit by same plaintiff, in another capacity . . 65
by deed 67, 68
title by 68, 69, 74
from release of dower 69
in pais 69
from contract 70
equitable (by misrepresentation) 70, 71, 72, 73, 74
from entrusting another with chattels 74
none from earlier inconsistent defense 67
election of remedies, as 74, 75

waiver as 75, 76
creation of restrictions by 142
doctrine of part performance based on 144

EVIDENCE.
same rules in equity as at law 41
nature of, required to correct mistake in instrument . . 97

EXECUTION.
(see JUDGMENT).
to restrain collection of 160-162
equitable set-off of 160

EXECUTOR.
(see ADMINISTRATORS AND EXECUTORS; DEATH; WILLS).

EXONERATION.
when one may have 206

F

FALSE REPRESENTATION.
(see MISREPRESENTATION).

FIDUCIARY RELATIONSHIP.
as basis of fraud 101-103
various classes of persons holding 101-103
release obtained by one in, may be disregarded . . . 110
as a basis for accounting 202

FIRE.
destroying buildings agreed to be sold 83,84
no defense to building contract 88
no defense to agreement to pay rent 88

FORECLOSURE.
of foreign mortgage 35, 36
redemption from fraudulent 112

FOREIGN LAW.
mistake of, as basis of relief 92

FORFEITURES.
relief against 7, 87

FRAUD.
(see MISREPRESENTATION; ESTOPPEL; FRAUDULENT CONVEYANCE; FRAUDULENT PREFERENCE)
between husband and wife 13, 14, 15

between partners 17
of plaintiff as ground for refusal of relief 48
previously attempted by plaintiff, no defense 49
right to litigate for, not assignable 56
contrasted with mistake 92
jurisdiction in England and America . . . . . 98 *et seq.*
relief from results of constructive . . . . . 100 *et seq.*
apparent from nature of bargain 100
illegal contracts, as 101
from contracts affecting public officers 101
presumed from circumstances of parties 101
by conveyance or transfer in fraud of creditors . 103 *et seq.*
by conveyance in fraud of marital rights 103
by grantee as element in fraudulent conveyance . . . 106
certain sales of merchandise in bulk, as 106, 211
not apparent in *prima facie* case, no bar to plaintiff's recovery 108
as a legal or equitable defense 110
right to sue for, not assignable 112
right to set aside instruments for, assignable 112
claim of, must be alleged and proven 112
party guilty of, may not have relief 112
in procuring trust property, relieved after fraudulent actor's death 112
in absence of, contract will not be reformed to make less harsh 113
antecedent to contract may be merged in it 113
in substituting agreement, as ground for enforcing oral contract 147
as defense to specific performance 155, 156
as basis of equitable interference with suits and judgments 160
on the public as a basis of trademark suits 185

FRAUDULENT CONVEYANCE.

void as against creditors 103
void, if in violation of martial rights 103
grantee's fraud as element in 106
certain sales of merchandise in bulk, as 106
extent of knowledge of, by grantee 106
execution of oral trust, not a 107

FRAUDULENT PREFERENCE.

to certain creditors, a matter of statute 104, 108

FUND.

ordering payment from 11
conversion where proceeds mixed in 78
marshaling of 212, 213

G

GIFTS.
(see DONATIONS CAUSA MORTIS).
between husband and wife 15
validity of as assignments 52, 53
oral, of incorporeal personalty 53
of bank books, notes, policies, etc. 53
donor may have reformation of instrument of gift . . 95
doctrine of part performance applied to 147

GOOD WILL.
agreement implied from sale of 130-133
history of Massachusetts decisions on 131

GUARDIAN.
certain purchases and sales by, fraudulent 101

H

HEIRLOOMS.
specific redelivery of 119

HEIRS.
deeds reformed, to insert the word 90
rights in decedent's agreements to buy or sell 81, 82

HISTORY.
of law courts in England 1, 2, 3
of legal actions 3
of early chancery jurisdiction 3, 4
of equity jurisdiction in Massachusetts 4, 5, 6
of rise of specific performance 116
of Massachusetts decisions on sale of good will 131

HUSBAND AND WIFE.
suits between, at common law 12
suits between, in equity 13
to set aside ante-nuptial contracts 13
to protect equitable interests 13
to recover property 13, 14 15
none for money loaned 14
specific performance between 14
to obtain equity to settlement 15
dower and curtesy as affected by equitable conversion 82, 83
when creditors of each other 104
conveyances between, whether fraudulent 107
certain trusts between 108

ILLEGALITY.
of contracts, as fraud 101

IMPROVEMENTS.
as elements of part performance 146
effect on, of failure to complete contract 150

INADEQUACY OF CONSIDERATION.
as an element of constructive fraud 100

INADEQUACY OF LEGAL REMEDY.
(see ADEQUATE REMEDY AT LAW).
as basis of equitable relief . . . . . 24 *et seq.*
where subject matter of contract is land, etc. 27
in some cases immaterial 28
where damages at law inadequate 120
because of vendee's insolvency 121
where debtor has promised security 121
as basis of remedy in accounting 204
for obtaining contribution between co-sureties 207

INDEMNITY.
bond of, in suit on lost instruments 86, 87
bond of, in patent suits 182
where one pays debt for which another is liable . 206, 209, 211 212

INFANTS.
decrees against, as defendants 37, 38
not chargeable with laches 51
possession of money for, does not terminate conversion 79
constructive fraud of guardian of 101

INFRINGEMENT.
of patents 181
of copyrights 183
of author's rights in unpublished plays, manuscripts, photographs, letters, etc. 184
of right of privacy 184
of rights in letters 184
of trade marks 184-187
of trade names, unfair competition 188-189

INJUNCTION.
against suits at law 8
against tort in another jurisdiction 35
against waste of agreed vendor or vendee 83
against husband's claim of curtesy 83
against enforcement of obligations obtained by fraud . 111
to enforce negative contracts 126

to enforce agreements implied from sale of good will . 130
as the method of enforcing restrictions 136
generally 158-201
kinds of and principal uses for 158, 159
to restrain suits and judgments 35, 160-162
to restrain acts of public or corporation officials . . 162-164
to restrain waste 165-168
to restrain trespass 168-173
to restrain disturbance of easement 172
to restrain nuisance 174-181
to restrain infringement of patents, copyrights, trade-marks, and unfair competition 181-191
to restrain interference with business or contract . . 191-201
in labor disputes 191-201

IN PARI DELICTO.
client and attorney not, in champertous contract . . . 48

IN PERSONAM.
decrees, render equity flexible 25, 26
equity acts . . . . . 34 *et seq.*

INSANE PERSONS.
decrees against, as defendants 37, 38
not chargeable with laches 51
possession of money for, does not terminate conversion 79
contract with, voidable as fraudulent 101

INSOLVENCY.
(see BANKRUPTCY).

INSURANCE.
(see FIRE).
assignment of policy of 53, 55, 60
estoppel from another's possession of policy 74
waivers arising in policies of 75, 76
conversion of proceeds of policies of 79
recovered by agreed vendor, for vendee 84
as subject of fraudulent conveyance 104

INTERFERENCE WITH BUSINESS OR CONTRACT.
a tort at common law 191
will be enjoined in equity, when 191-201

INTERPLEADER.
actions of 20
object of 21
plaintiff must be disinterested 21
claims in, must not be distinct in origin 21
effect of judgment already rendered 22
first decree in 22

final decree in 22
statutory interpleader 22
bill "in the nature of" 23
to determine validity of equitable assignment 57

J

JOINT OWNERS.
(See CO-OWNERS; CO-TENANTS).
in suits at law, or in equity 20

JUDGMENT.
foreign, various incidents of 35, 36, 37
as estoppel 65, 66, 67
merger of contract debt, in 67
upon constructive service, good *in personam* 65
in rem, effect of 66
for one of several parties 67
relief against improper 87
restraint of by court in equity 160-162
equitable set-off of 160
valid though in violation of injunction 162

JURISDICTION.
(see EQUITY JURISDICTION).

JURY IN EQUITY.
constitutional rights 32
waiver of 32
must be claimed when 32
submission of issues, sufficient 33
statutory provision for 33
effect of verdict 33

K

KING.
early courts followed 1
originally heard petitions for grace 3

L

LABELS.
(see TRADE NAMES).

LABOR,
enforcement of affirmative contracts requiring . . . 123-125
enforcement of negative contracts requiring 126-128
constitutional right to freedom of 191
interference with right to 191-201

LABOR UNIONS.
injunctions in disputes with and between . . . . . 192 *et seq.*
how sued 201

LACHES.
what constitutes 49-51
a form of estoppel 49
analogy of statutes of limitations 49
dependent on facts 49, 50, 51
when matter of law 50
requires knowledge of facts 51
certain suits not barred by 51
no defense, where plaintiff seeks relief from a void instrument 51
as defense to bill to reform for mistake 96
as a defense to restrictions 141
as a defense in nuisance 177, 179

LAND.
(See TITLE; TRESPASS; FRAUDLENT CONVEYANCE).
inadequacy of legal relief in contracts relative to . . . 27
illegal taking of, not ground for equitable relief . . . 27
possession of, as constructive notice of title 63
considered as personalty, under conversion 76
conversion in contracts regarding 78-84
sold under order or court, surplus treated as realty . . 78
proceeds from taking of. by eminent domain 79
where conversion by will, there may be election to reconvert 78
valid contract to convey usually enforced 117
enforcement of restrictions on 135-143
part performance of agreement to sell 143-147
partial performance of agreement to sell 147-148
time in contracts to sell 148-151
marketable title in sales of 151-152
lack of mutuality in contracts to sell 152-154
inadequacy of consideration in agreement to sell . . . 154
should be identified in bill for specific performance . . 157
waste . . . . . 165 *et seq*
damage to reputation of, not waste 168
projection of structure over 170

LANDLORD AND TENANT.
(see LEASE; TENANTS).

LAW.
(see COURTS OF COMMON LAW).
absence of plain, adequate and complete remedy at 124 *et seq*
effect of equity on rules of 7
equity follows the law 40, 41

LEASE.
covenant not to assign in, effect of 56
difference between liability of lessee and his assignee . 60
doctrine of part performance applied to 147

LEGACY.
(see WILLS; ADMINISTRATOR AND EXECUTOR).
equitable replevin of specific 119
specific, defined 207
contribution between persons entitled to 207, 208

LETTERS.
injunction against publication of 184

LIBEL AND SLANDER.
will not be enjoined 158

LIENS, EQUITABLE.
the maxims that support them 45

LIGHT AND AIR.
disturbance of easement of 173

LIS PENDENS.
referred to the doctrine of notice 64

LOST INSTRUMENTS.
legal rules permitting suit on 7, 86
recovery on, in equity 86
indemnity bond in suit on 86
defenses to relief on 88

M

MACHINERY.
noise and jar or, as a nuisance 174, 181
invention of by employees 190

MANDAMUS.
a remedy at law 10
as a remedy for certain official acts 162, 163

MANUSCRIPTS.
injunctions against publication of 184

MARTIAL RIGHTS.
conveyances in fraud of 103

MARKETABLE TITLE.
(see TITLE).
generally 151-152

MARRIAGE.
effect of, on contracts to convey 82
contracts in restraint of, fraudulent 101
as a consideration in conveyances 107

MARRIAGE SETTLEMENTS.
protected in equity 13, 14, 15, 107

MARRIED WOMEN.
(See HUSBAND AND WIFE; MARRIAGE; MARITAL RIGHTS).
rights against husband 12-15
rights on note of husband 12, 13
equitable interest protected 13

MARSHALING.
as between funds 212, 213

MAXIMS.
equity will not suffer a wrong to be without a remedy 39
equity follows the law 40
where the equities are equal, the law will prevail . . . 43
where interests are purely equitable and in other respects equal, priority in time gives the better equity 44
equity treats that as done which ought to be done . . 45
he who seeks equity must do equity 45
he who comes into equity must come with clean hands 46
equity aids the vigilant 49

MERGER.
of a debt in a judgment 67
of antecedent fraud, in contract 113

MINORS.
(see INFANTS).

MISREPRESENTATION.
(see FRAUD; ESTOPPEL).
as basis of estoppel 70-73
as fraud in equity . . . . . 99 *et seq.*
as a defense to specific performance 155-156
as a bar to relief in trademark suits 187
as an element in trade name protection 188

MISTAKE.
as a ground for relief in equity 88
of law 89, 90
mutual, of law, causing unjust enrichment 89
contrasted with accident 89
in deeds and titles 90, 92
of law and fact in payment of money 90
mutual, of fact 91-93
how and when remedied 93, 96-98
in written instruments *inter vivos* 94-96
in deed of gift 95
in wills, not relieved 95
contrasted with fraud 95
evidence required to remedy 97
of counsel no ground for equitable relief 160

MONEY.
paid under mistake of law not recoverable 90
paid under mistake of fact sometimes recoverable . . 90
equitable replevin of 119
loaned on agreement to give mortgage 121
equitable restraint of illegal appropriation of 164
contract action, for money trust 202
rules for application of, where several debts 205

MONOPOLY.
(see COMPETITION).
criminal statutes prohibiting 126, 128
civil statutes prohibiting 128
Sherman Anti-trust Act 128
enforcement of contracts affecting 128
holder of patent has a legitimate 129

MORTGAGES.
relief from, in Massachusetts 5
equity jurisdiction over foreign 36
payment of additional sums as requirement for redemption 45
rights of assignee 60
agreed vendor likened to mortgagee 80
forfeitures in 87
discharged by mistake, re-established in equity . . . 98
as subject of fraudulent conveyance 104
redemption from fraudulent foreclosure of 112
holders of, may enforce restrictions 137
waste as between parties to 167
subrogation of one who pays 211

MULTIPLICITY OF SUITS.
avoidance of 25, 30, 163, 176

MUTUALITY.
lack of, as a defense to certain bilateral contracts . 152-153

N

NE EXEAT REGNO, WRIT OF.
to prevent defendant's leaving, without bond 38
relief from mistake as to bond in 90

NEGATIVE CONTRACTS.
enforcement of . . . . . 126 *et seq.*
involving personal services 126-128
limiting use of property 128-129
against competing 129-133

NEGLIGENCE.
as a bar to relief from accident 86
as a bar to rehcf from mistake 93

NEGOTIABLE INSTRUMENTS.
(see PROMISSORY NOTES).

NOISE.
injunction to restrain 174

NOTICE.
effect of 61
under recording acts 61, 63, 64
under Mass. Land Court Act 61
estoppel from 61
as affecting personalty 62
actual 62, 64
constructive 62, 63
presumed from evidence 63
recitals in deeds, as 63
lis pendens 64
acquired after payment, but before deed 64
immaterial, where grantor's title is good by estoppel . 74

NUISANCE.
jurisdiction to restrain 174-181
distinguished from other torts 174
examples of private 174, 175
actions at law for 175
examples of public 176
lessor's right to enjoin 177
limitation of right to sue for 177
occasional, not enjoined 178
relative hardship of parties 178
damages in actions for 179, 181
prescriptive right to maintain 179
defenses to 179-181
legislature may create, by statute 180
licenses as affecting 180
decrees in bills for 181
strike may constitute public 200

O

OFFICERS.
(see CORPORATION; PUBLIC OFFICERS).

OPTIONS.
on property, not naming price, not enforcible 123
how affected by doctrine of mutuality 153

ORDERS.
as assignments 59

P

PAROL CONTRACT.
(see STATUTE OF FRAUDS).

PAROL EVIDENCE.
competent to prove mistake in instrument 97

PART PERFORMANCE.
(see STATUTE OF FRAUDS).
as basis for exception to Statute of Frauds 143-147
ground for enforcement 144
acts of 144-146
doctrine repudiated in certain states 144
doctrine applies to easements and leases 147
when doctrine is applied to gifts 147

PARTIAL PERFORMANCE, WITH COMPENSATION.
when vendor and vendee may have 147-148
distinguished from part performance 147

PARTIES.
equitable . . . . . 12 *et seq*
suits between those having co-ownership 19, 20
husband and wife . . . . . 12 *et seq*
partners . . . . . 16 *et seq*
having distinct rights 20
in interpleader 20
death of, as affecting conversion 81, 82
where defrauded person has died 102
to conveyance, cannot avoid because fraudulent as to creditors 108
guilty of fraud may not have relief 112
in labor disputes 201

PARTITION.
of real estate in equity 19
of chattels in equity 19, 20

PARTNERS.
suits between partners . . . . . 16 *et seq*
at common law 16
in equity 17
to establish and regulate partnership 17
to dissolve partnership 17, 18
accounting in 18, 19
contribution in 19
whether all but plaintiff should be defendants . 19
effect of judgment for one of three, on note . . . 67
specific performance between, of agreement to sell business 120

vendor of good will may not compete as 132
surviving partner, certain rights in competition . . 132, 133

PARTNERSHIPS.
(see PARTNERS; BUSINESS).
suits between, having same members 16
effect of sale of good will of 132, 133

PATENTS.
assignability of applications for 55
mutilation of assignments of 88
holder of, may enforce monopoly 129
suits for infringement of 181, 182
accounting in patent suits 190-191
no restraint, as unfair competition, after expiration of 188

PENALTIES.
relief from 87

PERSONAL PROPERTY.
(see CHATTEL MORTGAGES; ASSETS; CHOSES IN ACTION; FUND; SPECIFIC DELIVERY OF CHATTELS).
suits between co-owners of 19, 20
absence of notice, as affecting title to 62
no estoppel from entrusting another with 74
considered as real estate, under doctrine of equitable conversion 76
contract for sale of, enforced if property is unique . 118, 120
enforcement of covenants restricting use of 137
trespass to, restrained 173

PERSONAL SERVICE.
ordinarily required for jurisdiction 34
service on attorney may be 36

PHOTOGRAPHS.
injunction against publication of 184

PHYSICIAN.
certain contracts with patient, voidable 102

PICKETING.
(see BOYCOTTS AND STRIKES; INTERFERENCE WITH BUSINESS. OR CONTRACT).
as an element in industrial disputes 199, 200

PLAYS.
injunction against publication of 184

POLLUTION.
of air by smoke or odor 174, 179
of water 175, 177, 178, 179

POWERS.
relief from defective execution of 87

PREFERENCE.
(see FRAUDULENT PREFERENCE).

PRESCRIPTION.
may affect defendant's right to set up clean hands maxim 49
as a defense to bill for nuisance or trespass 177, 179

PRIORITIES.
maxims respecting 42-44
between successive assignees 59-60
under recording acts 61, 63, 64

PRIVACY.
injunction to protect the right of 184

PRIVITY OF ESTATE.
necessary in order that covenants shall run with land 135

PROBATE COURT.
equity jurisdiction in, in Massachusetrs 6

PROCEDURE.
three classes of modern 4
the jury in equity 32, 33
contempt 34
equity follows legal 41

PROFERT.
formerly required, of sealed instruments 7, 86

PROFITS.
(see DAMAGES).
when allowed, of on redemption from foreclosure . . 112
allowed in decrees for copyright infringement 183
when allowed in infringement suits 190-191
distinguished from damages, in accounting 204

PROMISSORY NOTES.
(see WRITTEN INSTRUMENTS and LOST INSTRUMENTS).
between husband and wife 12, 13
between partners 16, 17
assignments of . . . . . 52, 53 ,54, 60
estoppel from judgment on, for partner 67

PROMOTERS.
certain contracts of, with corporation, voidable . . . 102

PUBLIC NUISANCE.
(see NUISANCE).

PUBLIC OFFICERS.
fraudulent contracts affecting 101
quo warranto and mandamus against 162-163
restraint of illegal acts of 162-164
license from, as a defense to bill for nuisance . . . 180

PUBLIC POLICY.
ground for holding certain transactions fraudulent . . 109
determines how far contracts bind assigns 139, 140

Q

QUO WARRANTO.
a remedy at law 10
as a remedy for certain official acts 162

R

REAL ESTATE.
(see LAND).

RECEIVERS.
equity courts may appoint 18

RECITALS.
in deeds, as notice 63, 64

RECONVERSION.
occurs when 79

RECORDING ACTS.
effect of 61-64

REFORMATION.
of written agreements, for mistake 96
of deeds of gift, for mistake 95
of wills, not granted in equity 95
of contract, after fraudulent alteration 110

RELEASE.
given to one in fiduciary relation, may be disregarded . 110

REMEDIES IN EQUITY.
(see EQUITY JURISDICTION; DECREES).

REPARATION OF TORTS.
(see INJUNCTIONS).
how jurisidction may arise 119
by injunction 165-201

REPLICATION.
jury may be claimed in Massachusetts within ten days after 32

REPRESENTATIONS.
(see MISREPRESENTATION).

RESCISSION.
(See CANCELLATION).
of contract requires that defendant be put in *statu quo* 46
of contract obtained by fraud 100
of contract, with action of tort for deceit 109
of contract, with equitable relief 110
of contract, only for fraud or acts going to essence of contract 113
effect of, is to restore defendant's earlier rights . . 113

RES JUDICATA.
(see ESTOPPEL).
or estoppel by record 65-67
follows judgment, not verdict 65
dismissal of bill is not 66
from judgment *in rem* 66
none, as to contract, from refusal to order specific performance 116

RESTRAINT OF TRADE.
(see MONOPOLY; COMPETITION).

RESTRICTIONS.
certain obligations of grantee may be 135
definition of 135
how created and enforced 135-143
may apply to personalty or land 136, 137
general scheme to benefit other land necessary . . 137-140
resulting from statute 137, 138
creator of, may enforce 138
may not be for benefit of stranger 139
not to be implied 139
requiring active duties 140
burden and benefit of, pass to assigns 139-140
duration of 140, 141
when not enforcible 141
money damages for violation of 141, 142
land freed from by Land Court 142
no defense to, that neighborhood will change 142
effect of dividing lot subject to 142
Statute of Frauds applies to 142
created by estoppel 142
result of non-user or abandonment 142, 143
effect of plaintiff's technical violation 143
violator's expenditures no defense 143

S

SALE.
(see LAND; PERSONAL PROPERTY; ASSIGNMENTS).
in bulk, may be fraudulent 106, 211

SEAL.
effect of in equity 7
omission by mistake, corrected 94

SEALED INSTRUMENTS.
(see LOST INSTRUMENTS; DEEDS; CONTRACTS; WRITTEN INSTRUMENTS).
payment of, how pleaded 7
necessity for profert of 86

SECURITIES.
specific redelivery of 119
sureties' rights in 208
rights in, upon subrogation 209, 210

SEPARATE ESTATE OF WIFE.
basis of suits in equity 13, 15

SPECIFIC DELIVERY OF CHATTELS.
as a form of relief from fraud 111
as reparation of tort 119

SPECIFIC PERFORMANCE.
between husband and wife 14
may be only adequate remedy in land contracts, etc. . 27
bill for, where decree impossible, retained for damages 31
plaintiff in, must perform his part 45
generally . . . . . 115 *et seq*
definition and nature of 116
not an absolute right, but rests in discretion 116
none where vendor has conveyed 118
of contracts concerning chattels 119
of agreement to compromise as will 119
of contracts to sell stocks and bonds 121
of agreements to arbitrate 121-123
of agreements to give options 123
of award after arbitration 123
of contracts involving continuous labor 123-125
of negative contracts . . . . . 126 *et seq*
of contracts regarding trade secrets 127
of contracts in restraint of trade 128-129
of agreements not to compete . . . . . 129 *et seq.*
of contracts arising from sale of good will . . . . 129 *et seq*
of contracts for and against third persons . . . . 133 *et seq*
of restrictions 136
Statute of Frauds — part performance 143-147
of oral contract, where fictitious agreement substituted 147
partial performance, with compensation 147-148
where time is of the essence of the contract 148
only where title is marketable 151-152

inadequacy of consideration as affecting 154
sundry defenses to 155
alternative relief, with suit at law 155

STAKEHOLDER.
may bring interpleader 20, 21
when sued may summon claimant 22

STATUTE OF FRAUDS.
no bar to certain parol transfers under conversion . . 80
as bar to certain corrections in instruments 97
does not apply where oral trust has been executed . . 107
has no application to constructive frauds 113
no defense to fraudulent grantee from oral trustee . 113-114
as bar to suit for purchase price of executed contract . 118
applies to restrictions 142
distinguished from certain other statutes 143
effect of part performance on 143-147
various requirements of 143
agreement covering realty and personalty is within . . 144
no bar to enforcement of oral contract following certain frauds 147
as affecting necessity for mutuality 153
as a defense to specific performance 156
value of land recovered, when agreement within . . . 157
application of payment to debt barred by 205
subrogation by surety who does not raise defense against creditor 212

STATUTE OF LIMITATIONS.
as a guide for determining laches 49
application of payment to debt barred by 205
subrogation by surety who does not raise defense against creditor 212

STATUTES.
English Judicature Act 2
Statute of Westminister 3
defining equirtable procedure 4
conferring equity jurisdiction in Massachusetts . . . 5, 6
permitting equitable defenses 8, 160
defining rights of married women in Massachusetts 12, 13, 15
permitting partition of chattels 20
"statutory interpleader" under 22, 23
limiting equity jurisdiction 26
removing money limit on equity jurisdiction 31
affording new form of relief, ground for jury trial . . 31
giving right to jury trial 33
vesting title in new trustee 37

vesting title without conveyance 36, 37
appointing a trustee to complete sale 37
permitting suit by purchaser of stock on a margin . . 46
giving assignee right to sue at law 54
for recording deeds 61, 62, 63, 64
requiring executor or administrator specifically to perform 81
relieving from fraudulent conveyances . . . . . 103 *et seq*
setting aside fraudulent preferences 104, 108
protecting insurance payable to wife 104
excluding from valid gifts to wife, those in fraud of creditors 104
broadening power of executors, etc. to sue for fraudulent conveyance 105
making certain sales in bulk, fraudulent 106, 211
allowing appointment of master to perform decree . . 116
allowing equitable replevin 119
permitting arbitration of controversies 122
criminal against monopolies 126, 128
civil against monopolies 128
prohibiting injunctions in certain labor disputes . . 126 ,195
Sherman Anti-trust Act 128, 198
limiting right to use another's name in business . . . 133
may create restrictions 136
allowing purchasers from state to enforce restrictions 137, 138
limiting enforcement of restrictions 140
permitting court to free land from restrictions 142
that resemble the Statute of Frauds 143
federal, on enjoining suits 162
to restrain illegal appropriations 164
concerning waste 165
preventing easement of light and air by prescription . 173
concerning abatement of nuisances 175
creating nuisances 176, 180
concerning injunctions in labor disputes . . . . . 192 *et seq.*
making non-membership in union a prerequisite to employment a crime 192
allowing peaceful persuasion of laborers 199, 200
governing accounting 203

STOCKHOLDERS.
(See CORPORATIONS).
specific performance of agreements of, to sell 121
may restrain acts of officers, how 162-164

STRIKES AND BOYCOTTS.
as ground for equitable relief 191-201

SUBROGATION.
one may have, though guilty of constructive fraud . . 113
when one may have 209-212
at law and in equity 209
extent of recovery 211, 212

SUITS.
(see EQUITY JURISDICTION; ACTIONS).

SURETIES
contribution between 207-209
subrogation of 209-212

T

TAX.
non-payment of, as waste 167
subrogation of one paying, to collector's lien 211

TENANTS.
(See LEASE).
waste between landlord and 165-166
when landlord may not enjoin business of 180

TENDER.
not always a prerequisite to specific performance . . 45
when necessary at law and in equity 149, 151
lack of, as a defense 156

TIMBER.
cutting of, as waste 166

TIME OF ESSENCE OF CONTRACT.
for performance usually formal rather than essential . 148
different rule at law 148
necessity for tender 149, 151
how made in equity 149, 150
effect of 150

TITLE.
(See LAND; DEEDS; FRAUDULENT CONVEYANCE).
notice as affecting 61, 62, 63, 64
by estoppel 68, 69
passes to whom 74
mistakes in, sometimes remedied 90, 92
fraudulent statements as to 99
partial performance where defects in 147
must be marketable, for specific performance 151
defective on records, may be marketable 151
when court will pass on marketability of 151
must be marketable at what time 151, 152
cloud on, as ground for equitable action 163, 171
should first be settled at law 171

TORT.
(See INJUNCTIONS).
early actions of 3
certain, not assignable 55, 56
remedy at law for deceit 109
reparation and prevention of 165-201

TRADE MARKS AND NAMES.
injunctions against violation of marks 184-187
registration of marks 185
whether or not a trademark is property 185
assignability of 187
injunctions against violation of names 188-189
accounting in trademark suits 190-191

TRADE SECRETS.
duty of employee not to reveal 127
innocent purchaser of, may use 127
injunctions against violation of 189-190
accounting for violation of 190-191

TRESPASS.
definition of 168
when equity will restrain 168-173
by projection of structure 170
by disturbing private easements 172
to personalty 173
confusion with nuisance 174

TRIAL BY JURY
right to, in equity 32, 33

TRUSTEE.
judgment against, at law, no bar to certain equity suits 67
agreed vendor likened to 80
purchases or sales of trust property by, fraudulent . . 101
in bankruptcy may set aside fraudulent conveyance . 105
under oral trust, may convey, though insolvent 107
under oral trust, may set up Statute of Frauds; his grantee may not 114

TRUSTS.
equitable subject matter 9, 10
oral, may be carried out, though trustee insolvent . . 107
between husband and wife 108
accounting, between funds 202
accounting, following a fund 202

U

UNDISCLOSED PROFITS.
of promoter, receivable by corporation 103

UNDUE INFLUENCE.
causing mistake, relief from 90
as basis of relief for fraud 101
not a necessary element in constructive fraud 102
specific redelivery of property obtained by 111

UNFAIR COMPETITION.
injunctions to prevent 188-190
accounting on suits to restrain 190-191

UNILATERAL MISTAKES.
not ordinarily relieved from 89-91, 93, 95
of law causing unjust enrichment 89, 90

UNJUST ENRICHMENT.
as a basis of equitable relief 89, 90
between trust funds 210

V

VERDICT.
of jury in equity 33
certain tort claims assignable only after 55

VOLUNTEERS.
heirs and personal representatives are 96

W

WAIVER.
of defense does not always give jurisdiction 28, 29
of defense may in certain cases give jurisdiction . . . 30
of right to jury trial 32
as a form of estoppel 75, 76
of certain requisites in insurance policies 76
failure to make tender may be, of certain rights . . . 151

WASTE.
as between agreed vendor and vendee 83
at common law and in equity 165-168
basis of relief in 166
between co-tenants 166
non-payment of taxes as 167
failure of life tenant to insure as 167
between mortgagor and mortgagee 167
against life tenant 167
certain kinds not enjoined 167-168
damages in 168

WATER.
escaping, as a nuisance 174
stoppage of, as a nuisance 175
pollution of, as a nuisance 175, 177, 178, 179
obstruction of naviagable, as a nuisance 176

WIFE.
(see HUSBAND AND WIFE; DOWER; MARRIED WOMEN).
her equity to a settlement. 15

WILLS.
(see ADMINISTRATOR AND EXECUTOR; LEGACY).
conversion ordered in 77, 79
rights of devisees, where testator made contracts to sell land 82
mistakes in, not remedied in equity 95
agreements to compromise, enforced 119

WRITS.
ancient precedents for 3

WRITS OF ENTRY.
as a method of relief from fraud 98, 99, 100
after a special attachment at law 104
adequacy of, as a bar to equitable action 163, 171

WRITTEN INSTRUMENTS.
(see DEEDS; LOST INSTRUMENTS; SEALED INSTRUMENTS).
conversion in 77
alteration or mutilation of, relief from 88
relief from results of mistake in 94-98
mistakes in, *inter vivos* . . . . . 94 *et seq*
when donor may have relief 95
wills not reformed 95
how and when mistake in, is relieved 96-98
evidence required to reform 97-98